



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97294; File No. SR-FINRA-2022-024]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments Nos. 1 and 2, to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information

April 12, 2023.

I. Introduction

On July 29, 2022, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the FINRA Rule 12000 Series (Code of Arbitration Procedure for Customer Disputes) (“Customer Code”) and the FINRA Rule 13000 Series (Code of Arbitration Procedure for Industry Disputes) (“Industry Code”) (together, “Codes”) to modify the current process relating to the expungement of customer dispute information.³

The proposed rule change, as modified by Amendments Nos. 1 and 2, (hereinafter referred to as the “proposed rule change” unless otherwise specified) would amend the Codes to: (1) set forth requirements on expungement requests (a) filed during an investment-related, customer initiated arbitration (“customer arbitration”) by an associated person, or by a party to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The proposed rule change was published for comment in the *Federal Register* on August 15, 2022. See Exchange Act Release No. 95455 (Aug. 9, 2022), 87 FR 50170 (Aug. 15, 2022) (File No. SR-FINRA-2022-024) (“Notice”).

the customer arbitration on behalf of an associated person (an “on-behalf-of request”), or (b) filed by an associated person separate from a customer arbitration (“straight-in request”); (2) establish a roster of experienced public arbitrators from which a three-person panel⁴ would be randomly selected to decide straight-in requests (the “Special Arbitrator Roster”);⁵ (3) establish procedural requirements for expungement hearings; and (4) codify and update FINRA’s Notice to Arbitrators and Parties on Expanded Expungement Guidance (“Guidance”) that arbitrators and parties would be required to follow.⁶ In addition, the proposed rule change would amend the Customer Code to specify procedures for requesting expungement of customer dispute information arising from simplified arbitrations.⁷ The proposed rule change would also amend the Codes to establish requirements for notifying state securities regulators and customers of expungement requests and allow participation of state securities regulators in straight-in requests.⁸

The proposed rule change was published for comment in the Federal Register on August 15, 2022.⁹ On September 27, 2022, FINRA consented to an extension of the time period in

⁴ Under the Codes, the term “panel” means the arbitration panel, whether it consists of one or more arbitrators. See FINRA Rules 12100(u) and 13100(s). Under the Codes, a customer’s or claimant’s damage request determines whether a single arbitrator or a three-person panel will consider and decide an arbitration case, though in some cases the parties may agree to a different number. See FINRA Rules 12401 and 13401; see also Notice at 50171 n.10. Unless otherwise specified in the Order, the term “panel” will mean either a panel or single arbitrator.

⁵ Among other requirements, public arbitrators are not employed in the securities industry and do not devote 20 percent or more of their professional work to the securities industry or to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry. See FINRA Rules 12100(aa) and 13100(x).

⁶ See Guidance, available at <https://www.finra.org/arbitration-and-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

⁷ See Notice at 50170.

⁸ See id. at 50171.

⁹ See Notice supra note 3.

which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to November 11, 2022.¹⁰ On November 10, 2022, FINRA responded to the comment letters received in response to the Notice and filed an amendment to the proposed rule change (“Amendment No. 1”).¹¹ On November 10, 2022, the Commission published a notice of filing of Amendment No. 1 and an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.¹² On December 8, 2022, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to April 12, 2023.¹³ On April 3, 2023 FINRA responded to the comment letters received in response to the Order Instituting Proceedings and filed a second amendment to the proposed rule change (“Amendment No. 2”).¹⁴ The

¹⁰ See letter from Mignon McLemore, Associate General Counsel, Office of General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, dated September 27, 2022, available at <https://www.finra.org/sites/default/files/2022-09/sr-finra-2022-024-extension1.pdf>.

¹¹ See letter from Mignon McLemore, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated November 10, 2022 (“FINRA November 10 Letter”). The FINRA November 10 Letter is available at the Commission’s website at <https://www.sec.gov/comments/sr-finra-2022-024/srfinra2022024-20150592-319706.pdf>. Comment letters received on the proposed rule change are available at <https://www.sec.gov/comments/sr-finra-2022-024/srfinra2022024.htm>.

¹² See Exchange Act Release No. 96298 (Nov. 10, 2022), 87 FR 68779 (Nov. 16, 2022) (File No. SR-FINRA-2022-024) (“Order Instituting Proceedings”).

¹³ See letter from Mignon McLemore, Associate General Counsel, Office of General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, Commission, dated December 8, 2022, available at <https://www.finra.org/sites/default/files/2022-12/sr-finra-2022-024-extension2.pdf>.

¹⁴ See letter from Mignon McLemore, Associate General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated April 3, 2023, (“FINRA April 3 Letter”) available at <https://www.sec.gov/comments/sr-finra-2022-024/srfinra2022024-20163319-333785.pdf>. Amendment No. 2 is available at <https://www.finra.org/sites/default/files/2023-04/sr-finra-2022-024-partial-amendment-2.pdf>.

Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons and is approving the proposed rule change, as modified by Amendments Nos. 1 and 2, on an accelerated basis.

II. Description of the Proposed Rule Change

Background

Information regarding customer disputes involving associated persons is maintained in the Central Registration Depository (“CRD”). In general, the information in the CRD system is reported by registered broker-dealer firms (“firms” or “member firms”),¹⁵ associated persons, and regulatory authorities in response to questions on the uniform registration forms.¹⁶ These forms are used to collect registration information, which includes, among other things, administrative, regulatory, and criminal history, and financial and other information about associated persons, such as investment-related, customer-initiated arbitrations, civil litigations, or customer complaints (i.e., “customer dispute information”).¹⁷ Among other things, FINRA makes specific information in the CRD system publicly available through BrokerCheck, including customer dispute information for associated persons who are currently or were formerly registered with FINRA.¹⁸

¹⁵ Under the Codes, a “member” includes any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated, suspended, cancelled, revoked, the member has been expelled or barred from FINRA, or the member is otherwise defunct. See FINRA Rules 12100(s) and 13100(q); see also Exchange Act Release No. 88254 (Feb. 20, 2020), 85 FR 11157 (Feb. 26, 2020) (Order Approving File No. SR-FINRA-2019-027).

¹⁶ The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), Form BR (Uniform Branch Office Registration Form), Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form). See Notice at 50172 n.20.

¹⁷ See Notice at 50172.

¹⁸ BrokerCheck is a free tool available on FINRA’s website to help investors make informed choices about the associated persons and broker-dealer firms with whom they

FINRA rules allow broker-dealers and their associated persons to seek expungement of certain customer dispute information from the CRD system and BrokerCheck.¹⁹ In general, an associated person seeks expungement of customer dispute information through the FINRA arbitration process.²⁰ The Customer Code, which comprises the series of rules governing customer arbitrations, governs expungement requests filed by firms or associated persons during customer arbitrations.²¹ In contrast, the Industry Code comprises the series of rules governing arbitrations for disputes between or among industry parties, such as between a broker-dealer and an associated person, including straight-in requests.²² As a result, whether an expungement request is governed by the Customer Code or Industry Code will generally depend on whether the request is filed during a customer arbitration or is a straight-in request filed separately from a customer arbitration.²³

Both the Customer Code and the Industry Code require arbitrators to hold a recorded hearing regarding, and review materials related to, the appropriateness of expungement of customer dispute information.²⁴ According to FINRA, its rules and guidance provide that

may conduct business. See “About BrokerCheck,” available at <http://www.finra.org/investors/about-brokercheck>. Broker records are available in BrokerCheck for ten years after an associated person leaves the industry, and associated persons who are the subject of disciplinary actions and certain other events remain on BrokerCheck permanently. See Notice at 50172 at n.24.

¹⁹ See Notice at 50172-73.

²⁰ See id. at 50190. An associated person may also seek expungement by going directly to court without first going to arbitration. According to FINRA, from January 2016 through December 2021, associated persons sought expungement of 194 customer dispute information disclosures in direct-to-court expungement cases, or less than 2 percent of the customer dispute information disclosures that were sought to be expunged in FINRA’s Dispute Resolution Forum (“DRS arbitration forum”). See id. at 50191.

²¹ See id. at 50175-78; see also FINRA Rule 12000 series.

²² See Notice at 50178-80; see also FINRA Rule 13000 series.

²³ See infra notes 69-70 and accompanying text.

²⁴ See FINRA Rules 12805 and 13805; see also Notice at 50173.

arbitrators may recommend expungement for only three reasons: (1) the claim, allegation, or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (3) the claim, allegation, or information is false.²⁵ In addition, arbitrators are required to indicate which reason is the basis for a recommendation (i.e., “factual impossibility, mistake, or falsity”)²⁶ and to provide a brief written explanation of the reasons for recommending expungement.²⁷

Regardless of whether expungement of customer dispute information is sought directly through a court or in arbitration, FINRA Rule 2080 requires a broker-dealer firm or associated person seeking expungement to obtain an order of a court of competent jurisdiction directing such expungement or confirming an award containing expungement.²⁸ FINRA will expunge customer dispute information only pursuant to a court order.²⁹ If a court directs expungement or

²⁵ See Notice at 50173.

²⁶ See FINRA Rules 2080, 12805, and 13805. These requirements are supplemented by the Guidance, providing arbitrators with “best practices” and recommendations to follow when deciding expungement requests. See Notice at 50173 n.35 and accompanying text.

²⁷ See FINRA Rules 12805(c) and 13805(c).

²⁸ See Notice at 50172; see also FINRA Rule 2080.

²⁹ See Notice at 50172. FINRA Rule 2080 also requires firms and associated persons seeking a court order or confirmation of the arbitration award containing expungement to name FINRA as a party and serve FINRA with all appropriate documents. FINRA may, however, waive the requirement to be named as a party if it determines that the award containing expungement is based on affirmative judicial or arbitral findings that: (1) the claim, allegation, or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (3) the claim, allegation, or information is false. In addition, FINRA has sole discretion “under extraordinary circumstances” to waive the requirement that it be named in a court proceeding if it determines that the request for expungement and accompanying award are meritorious and expungement would not have a material adverse effect on investor protection, the integrity of the information in the CRD system, or regulatory requirements. See FINRA Rule 2080(b).

confirms an arbitration award containing expungement, the customer dispute information is removed from the CRD system, and is no longer made public through BrokerCheck.³⁰

Proposed Rule Change

A. Requests for Expungement under the Customer Code

FINRA Rule 12805 requires that arbitrators meet certain conditions in order to issue an award containing expungement of customer dispute information under the Customer Code.³¹

The rule generally does not, however, address when and how a request for expungement can be made by an associated person or as an on-behalf-of request during a customer arbitration, including the types of expungement requests that can and cannot be made during a customer arbitration, or when arbitrators must make expungement determinations during the customer arbitration.

The proposed rule change would amend FINRA Rule 12805 to set forth requirements addressing the method and timing for, and required contents of, expungement requests filed during a customer arbitration by an associated person or as an on-behalf-of request, including the types of expungement requests that must (or cannot) be made.³² Among other restrictions, proposed Rule 12805 would require that an expungement request made during a customer arbitration involve the same customer dispute information that is associated with the customer's

³⁰ See Notice at 50173-74.

³¹ FINRA Rule 12805 provides that a panel must comply with the following requirements in order to grant expungement: (1) hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement; (2) in cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement; (3) indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case; and (4) assess all DRS arbitration forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief. See also FINRA Rule 13805.

³² See Notice at 50174-77 (methods), 50180-81 (limitations), 50181-82 (timing).

statement of claim.³³ It would further require an associated person who is a named respondent in a customer arbitration to seek expungement of customer dispute information associated with the arbitration claim during the arbitration proceedings or forfeit the ability to seek to expunge the customer dispute information associated with the customer's statement of claim in any subsequent proceeding.³⁴ In addition, the proposed rule would authorize the Director of FINRA Dispute Resolution Services ("Director") to deny the forum to expungement requests that do not meet, among other things, the proposed method, timing, or content requirements.³⁵ In addition, the proposed rule change would also provide guidance on when a panel can rule on an expungement request made in the course of a customer arbitration.³⁶ Further, the proposed rule change would prohibit an associated person from: (1) intervening in an ongoing customer arbitration to request expungement³⁷ or (2) filing an expungement request as a new claim against a customer separate from a customer arbitration.³⁸

³³ See id. at 50174-77.

³⁴ See proposed Rule 12805(a)(1)(A).

³⁵ See Notice at 50182; see also proposed Rules 12203 and 13203.

³⁶ See Notice at 50177-78.

³⁷ See id. at 50178; see also proposed Rules 12805(a)(2)(E)(iii) and 12800(d)(2)(D).

³⁸ See Notice at 50178; see also proposed Rule 12805(a)(3). As elaborated below, where an associated person is neither named in a customer arbitration nor the subject of an on-behalf-of request, the associated person would be required to file a request to expunge customer dispute information as a straight-in request under proposed Rule 13805 against the member firm with whom they were associated at the time the subject of the request arose. Similarly, requests to expunge customer dispute information that is not associated with a customer arbitration—and that as a result are ineligible for expungement under proposed Rule 12805—would need to be filed as straight-in requests under proposed Rule 13805 against member firms under the proposed rule change. See proposed Rule 12805(a)(2)(E)(iii)b.; see also Section II.A.2. "No Intervening in Customer Arbitrations to Request Expungement."

1. Expungement Requests During a Customer Arbitration

a. Expungement Requests by a Respondent Named in a Customer Arbitration

Currently, an associated person who is named as a respondent in a customer arbitration (“named associated person”) is not required to seek expungement of customer dispute information associated with the arbitration claim during the arbitration proceedings. Rather, the associated person can either request expungement at any time during the customer arbitration or separately from the customer arbitration in a straight-in request.³⁹ If a named associated person requests expungement during the customer arbitration, does not withdraw the request, and the case goes to hearing and closes by award, the panel in the customer arbitration will decide the expungement request and include the decision as part of the customer’s award.⁴⁰ If the customer arbitration does not close by award after a hearing (e.g., the case settles), and the associated person continues to pursue the expungement request, the panel from the customer arbitration will hold an expungement-only hearing to decide the expungement request.⁴¹

³⁹ See Notice at 50175. There are currently several ways in which a named associated person may request expungement during a customer arbitration. The request may be included in the answer to the statement of claim that must be submitted within 45 days of receipt of the statement of claim, and may include other claims and remedies requested. See FINRA Rules 12303(a) and (b); see also FINRA Rules 13303(a) and (b). The expungement request may also be included in other pleadings (e.g., a counterclaim, a cross claim, or a third party claim). See FINRA Rule 12100(x). In general, parties must file initial statements of claim and all pleadings and other documents with the Director. See FINRA Rule 12300(b). The associated person may also request at any time during the case (outside of a pleading) that the panel consider the person’s expungement request during the hearing. Under FINRA Rule 12503, such a request is treated like a motion, which gives the other parties an opportunity to state objections. If there is an objection, the panel must decide the motion pursuant to FINRA Rule 12503(d)(5). See also FINRA Rule 13503(d)(5).

⁴⁰ FINRA stated that if an arbitration closes by award after a hearing, the panel from the customer arbitration would be best situated to decide the related issue of expungement. See Notice at 50175.

⁴¹ See *id.*

The proposed rule change would amend FINRA Rule 12805 to modify existing requirements and set forth new requirements for when and how a named associated person would file an expungement request during a customer arbitration.⁴² Under proposed Rule 12805(a)(1)(A), if a named associated person wants to seek expungement of customer dispute information associated with the customer's statement of claim, the named associated person would be required to make the expungement request during the customer arbitration.⁴³ As discussed below, these requests would be subject to limitations on how and when the requests may be made.⁴⁴ If the associated person does not request expungement of the customer dispute information associated with the customer's statement of claim during the customer arbitration, the associated person would forfeit the opportunity to seek expungement of that customer dispute information in any subsequent proceeding.⁴⁵

Proposed Rule 12203(b) would authorize the Director to deny the DRS arbitration forum to requests made during a customer arbitration to expunge customer dispute information that is not associated with the customer's statement of claim. The Director would also be authorized to deny the forum if a named associated person does not request expungement of the customer dispute information associated with the customer's statement of claim during the customer arbitration but then seeks expungement of the same customer dispute information in a subsequent proceeding.⁴⁶

⁴² See proposed Rule 12805.

⁴³ See proposed Rule 12805(a)(1)(A). FINRA stated that "[r]equiring the named associated person to request expungement in the customer arbitration increases the likelihood that a panel will have input from all parties and access to all of the evidence, testimony and other documents to make an informed decision on the expungement request." Notice at 50175.

⁴⁴ See proposed Rule 12805(a)(1)(B); see also Section II.C., "Limitations on Expungement Requests."

⁴⁵ See proposed Rule 12805(a)(1)(A).

⁴⁶ See proposed Rule 12203(c).

i. Method and Timing of Requesting Expungement in Customer Arbitration

The proposed rule change would limit how and when expungement requests may be made by a named associated person during the customer arbitration. Under the proposed rule change, if a named associated person requests expungement during the customer arbitration, the request would be required to be included in the answer to the statement of claim or in a separate pleading requesting expungement.⁴⁷ If the request is included in the answer, it must be filed within 45 days of receipt of the customer's statement of claim in accordance with existing requirements under the Codes.⁴⁸ If the named associated person requests expungement in a separate pleading, rather than the answer, the request would be required to be filed no later than 60 days before the first scheduled hearing begins.⁴⁹ FINRA believes these proposed deadlines should provide adequate time for: (1) the named associated person to assess the customer's case, the potential merits of an expungement request, and whether to file the request; and (2) the parties to the customer arbitration to prepare their expungement-related arguments, since the expungement issues will overlap with the issues raised by the customer's claim.⁵⁰ To request expungement after the filing deadline, the named associated person would be required to file a motion requesting an extension, which would be decided by the panel.⁵¹

ii. Required Contents of an Expungement Request in Customer Arbitration

⁴⁷ See proposed Rule 12805(a)(1)(C)(i). FINRA Rules 12100(x) and 13100(v) would be amended to include a "separate document requesting expungement" as a pleading under the Codes.

⁴⁸ See FINRA Rule 12303(a).

⁴⁹ See proposed Rule 12805(a)(1)(C)(i).

⁵⁰ See Notice at 50176.

⁵¹ See *id.* Pursuant to FINRA Rule 12503, if an associated person files a motion seeking an extension of the 60-day deadline, the opposing parties may state objections to extending the deadline, and the panel would decide the motion.

The proposed rule change would also set forth content requirements for an expungement request made by a named associated person during a customer arbitration. Under the proposed rule change, a request for expungement by a named associated person in a customer arbitration would be required to include the applicable filing fee under the Customer Code.⁵² In addition, a named associated person would be required to provide the CRD number of the party requesting expungement, each CRD occurrence number that is the subject of the request, and the case name and docket number associated with the customer dispute information.⁵³ Moreover, the proposed rule change would require the named associated person requesting expungement to explain whether expungement of the same customer dispute information was previously requested and, if so, how that request was decided.⁵⁴ Under the proposed rule change, if an expungement request fails to include any of the proposed requirements for requesting expungement, the request would be considered deficient and would not be served unless the deficiency is corrected.⁵⁵

b. Expungement Requests by a Party Named in a Customer Arbitration on Behalf of an Unnamed Person

⁵² See proposed Rule 12805(a)(1)(C)(ii)a.

⁵³ See proposed Rule 12805(a)(1)(C)(ii)b. through d. An occurrence is a disclosure event that is reported to the CRD system via one or more Disclosure Reporting Pages. See Notice at 50176 n.58. For example, Form U4 (Uniform Application for Broker-Dealer Registration) requires disclosure of information concerning an associated person that relates to the occurrence of an event reportable under Item 14 of Form U4 (e.g., certain customer complaints, arbitrations, and civil litigations) on the appropriate Disclosure Reporting Page. FINRA stated that these content requirements “would help ensure that FINRA, the panel, and the parties understand who is requesting expungement and which customer dispute information is the subject of the request.” See Notice at 50176; see also Guidance (stating that “arbitrators should ask a party requesting expungement whether an arbitration panel or a court previously denied expungement of the customer dispute information at issue and, if there was a prior denial, the expungement request should be denied.” See *supra* note 6.

⁵⁴ See proposed Rule 12805(a)(1)(C)(ii)e.

⁵⁵ See proposed Rules 12307(a)(8) through (11) and 12805(a)(1)(C)(ii). FINRA stated that “these proposed requirements for named associated persons requesting expungement are necessary for the timely consideration and orderly administration of expungement requests as well as to maintain the integrity of the CRD system.” Notice at 50176.

According to FINRA, the Codes do not specifically address on-behalf-of requests.⁵⁶ Currently, a party to a customer arbitration may file an on-behalf-of request for expungement during the customer arbitration. If the party files the request and the customer arbitration closes by award after a hearing, the panel will decide the expungement request and include the decision in the award. If the customer arbitration does not close by award after a hearing (e.g., the case settles), either the requesting party or the unnamed person could ask the panel to consider and decide the expungement request before it disbands. Under current practice, in this circumstance the panel from the customer arbitration will hold a hearing regarding the appropriateness of expungement pursuant to FINRA Rule 12805.⁵⁷

Proposed Rule 12805(a)(2) would codify this practice to permit a party to a customer arbitration to file an on-behalf-of request that seeks to expunge customer dispute information associated with the customer's statement of claim during the customer arbitration (provided the request is eligible for arbitration under proposed Rule 12805).⁵⁸ As with expungement requests made by a named associated person, the proposed rule change would set forth requirements governing how and when an on-behalf-of request may be made, and the contents of such request.

i. Method and Timing of Requesting Expungement on Behalf of an Unnamed Person

⁵⁶ The proposed rule change would define an "unnamed person" as "an associated person, including a formerly associated person, who is identified in a Form U4, Form U5, or Form U6, as having been the subject of an investment-related, customer-initiated arbitration claim that alleged that the associated person or formerly associated person was involved in one or more sales practice violations, but who is not named as a respondent in the arbitration." See proposed Rule 12100(ff).

⁵⁷ See Notice at 50176.

⁵⁸ See proposed Rule 12805(a)(2)(B). As with expungement requests filed by a named associated person in a customer arbitration, proposed Rule 12203(b) would authorize the Director to deny the DRS arbitration forum to requests made during a customer arbitration to expunge customer dispute information that is not associated with the customer's statement of claim. See Notice at 50175.

To help ensure that an associated person that is the subject of an on-behalf-of request is aware of the request, the proposed rule change would require the unnamed person to consent in writing⁵⁹ to the on-behalf-of request by signing the Form Requesting Expungement on Behalf of an Unnamed Person (“Form”).⁶⁰ By signing the Form, the unnamed person would be: (1) consenting to the on-behalf-of request;⁶¹ (2) agreeing to be bound by the panel’s decision on the request;⁶² and (3) acknowledging their understanding that if the customer arbitration closes by award after a hearing, the unnamed person would be barred from filing a request for expungement for the same customer dispute information in a subsequent proceeding.⁶³

The party making the request would also be required to file the request (including the Form) no later than 60 days before the first scheduled hearing.⁶⁴ Under the proposed rule change, filing and serving the on-behalf-of request would obligate the requesting party to represent the unnamed person and the unnamed person’s interests and to pursue the request for expungement on behalf of the unnamed person during the customer arbitration.⁶⁵

⁵⁹ See proposed Rule 12805(a)(2)(A).

⁶⁰ The unnamed person whose CRD record would be expunged and the party requesting expungement on the unnamed person’s behalf must both sign the Form. See proposed Rule 12805(a)(2)(C)(ii).

⁶¹ See Notice at 50176.

⁶² See proposed Rule 12805(a)(2)(D)(i). Signing the Form would also obligate the unnamed person to maintain the confidentiality of documents and information from the customer arbitration to which the unnamed person is given access and to adhere to any confidentiality agreements or orders associated with the customer arbitration. See proposed Rule 12805(a)(2)(D)(ii).

⁶³ See Notice at 50177.

⁶⁴ See proposed Rule 12805(a)(2)(C)(iii).

⁶⁵ See proposed Rule 12805(a)(2)(D)(iii). FINRA stated that requiring the parties’ consent “would help ensure that the unnamed person is fully aware of the request and that the firm is agreeing to represent the unnamed person for the purpose of requesting expungement during the customer arbitration.” See Notice at 50176. This would help prevent “associated persons filing arbitration claims seeking expungement of the same customer dispute information that was the subject of a previous denial by a panel of an on-behalf-of request.” See Notice at 50177.

ii. Required Contents of an On-Behalf-Of Request and Filing Fee

Under the proposed rule change, an on-behalf-of request would be required to include the same elements as a request for expungement by a named associated person during a customer arbitration.⁶⁶ Thus, the party requesting expungement on behalf of an unnamed person would be required to provide the applicable filing fee; the CRD number of the unnamed person; each CRD occurrence number that is the subject of the request; the case name and docket number associated with the customer dispute information; and an explanation of whether expungement of the same customer dispute information was previously requested and, if so, how it was decided.⁶⁷ In addition, the party requesting expungement would be required to include the Form, signed by the unnamed person whose CRD record is the subject of the expungement request and the party filing the request.⁶⁸

c. Deciding Expungement Requests during Customer Arbitrations

The proposed rule change would change when a panel is required to decide an expungement request (whether made by a named associated person or on behalf of an unnamed one) made during a customer arbitration. Specifically, when the panel would be required to decide an expungement request would depend on whether or not the customer arbitration closes: (1) by award after a hearing or (2) other than by award or by award without a hearing.

i. Panel Decides the Expungement Request if the Customer's Arbitration Closes by Award after a Hearing

Currently, if a named associated person requests expungement, or a party files an on-behalf-of request, and the customer's claim closes by award after a hearing, the panel may consider and decide the expungement request during the customer arbitration and issue its decision in the award. If, however, the party requesting expungement does not pursue the issue

⁶⁶ See proposed Rules 12805(a)(1)(C)(ii) and 12805(a)(2)(C)(i).

⁶⁷ See proposed Rules 12805(a)(1)(C)(ii) and 12805(a)(2)(C)(i).

⁶⁸ See proposed Rule 12805(a)(2)(C)(ii).

of expungement during the hearing, the panel may not decide the request and may deem it withdrawn.⁶⁹ Under these circumstances, the associated person may request expungement again at a later date.⁷⁰

Under the proposed rule change, if a named associated person requests expungement or a party files an on-behalf-of request during a customer arbitration and the customer's claim closes by award after a hearing, the panel in the customer arbitration would be required to consider and decide the expungement request and issue its decision in the same award, even if the requesting party withdraws or fails to pursue the request (in which case the panel would deny the expungement request with prejudice).⁷¹

ii. Panel Does Not Decide Expungement if the Customer's Arbitration Closes Other than by Award or by Award without a Hearing

Currently, if a named associated person requests expungement, or a party files an on-behalf-of request, the customer arbitration does not close by award after a hearing (e.g., the case settles), and the requesting party continues to pursue the expungement request, the panel from the customer arbitration will hold a hearing regarding the appropriateness of expungement.⁷² If the named associated person or party requesting expungement does not request that the panel hold a separate hearing to decide the expungement request, the panel may deem the request withdrawn, and the associated person may seek to file the request again at a later date.⁷³

⁶⁹ See Notice at 50177; see also FINRA Rules 12702 and 13702.

⁷⁰ See Notice at 50177.

⁷¹ See proposed Rules 12805(a)(1)(D)(i) and 12805(a)(2)(E)(i). FINRA stated that requiring a panel to deny with prejudice such requests "would prevent associated persons from withdrawing expungement requests to avoid having their requests decided by the panel that heard the evidence on the customer's arbitration claim, then seeking to re-file the request and receiving a potentially more favorable decision from a different set of arbitrators." Notice at 50177.

⁷² See FINRA Rule 12805; see also Notice at 50177.

⁷³ See Notice at 50177.

The proposed rule change would change this process. If the customer arbitration closes other than by award or by award without a hearing, the panel from the customer arbitration would not be permitted to decide the expungement request.⁷⁴ Instead, the associated person could only seek expungement through a straight-in-request under proposed Rule 13805 against the member firm at which the person was associated at the time the customer dispute arose, and a panel from the Special Arbitrator Roster would decide the request.⁷⁵

2. No Intervening in Customer Arbitrations to Request Expungement

The proposed rule change would provide that if an associated person is not a party to a customer arbitration (i.e., they are an unnamed person), and no party to the customer arbitration requests expungement on their behalf, the unnamed person would be prohibited from intervening in the customer arbitration to request expungement.⁷⁶ Instead, the unnamed person would be able to file the request as a new claim against the member firm at which the person was associated at the time the customer dispute arose under proposed Rule 13805 under the Industry Code, and a panel from the Special Arbitrator Roster would decide the request.⁷⁷

3. No Straight-in Requests Against Customers

Currently, although the practice is relatively rare, associated persons sometimes file expungement requests against customers as new claims, separate from a customer arbitration.⁷⁸ FINRA stated that such requests may unduly delay the resolution of a customer's claim and

⁷⁴ See proposed Rules 12805(a)(1)(D)(ii)a. and 12805(a)(2)(E)(ii)a.

⁷⁵ See proposed Rules 12805(a)(1)(D)(ii)b. and 12805(a)(2)(E)(ii)b. See also Section II.B., "Straight-in Requests under the Industry Code and the Special Arbitrator Roster."

⁷⁶ See proposed Rules 12805(a)(2)(E)(iii) and 12800(d)(2)(D).

⁷⁷ See proposed Rule 12805(a)(2)(E)(iii)b.

⁷⁸ See Notice at 50178. From January 2016 through December 2021, FINRA identified 6,476 straight-in requests to expunge customer dispute information, 116 of which were requests filed against a customer. See *id.* at 50178 n.89.

require a customer to participate in the resolution of the request.⁷⁹ The proposed rule change would prevent an associated person from requiring a customer to participate once the customer's claims have been resolved, by prohibiting the associated person from filing a request for expungement of the customer dispute information as a new claim against a customer separate from the investment-related, customer-initiated arbitration.⁸⁰ Customers would have the option to attend and participate in expungement hearings in straight-in requests, and the proposed rule change would include provisions to facilitate such attendance and participation.⁸¹

B. Straight-in Requests under the Industry Code and the Special Arbitrator Roster

As stated above, the Industry Code comprises the series of rules governing arbitrations for disputes between or among industry parties, such as between a member firm and an associated person. Under the proposed rule change, all requests to expunge customer dispute information that is not associated with a customer arbitration would be required to be filed as a straight-in request against the member firm with whom the associated person was associated at the time the subject of the request arose under proposed Rule 13805.⁸² In addition, an associated person could request expungement of customer dispute information that was associated with a customer arbitration under proposed Rule 13805 if: (1) the associated person is named in the arbitration or is the subject of an on-behalf-of request and the customer arbitration closes other than by award or by award without a hearing;⁸³ or (2) the associated person is the subject of a

⁷⁹ See id. at 50178.

⁸⁰ See proposed Rule 12805(a)(3). FINRA stated that customers should not be compelled to attend or participate in a separate proceeding to decide an expungement request after the customer has resolved their arbitration claim or civil litigation. See Notice at 50178.

⁸¹ See Notice at 50178.

⁸² See proposed Rules 12805(a)(1)(A) and 13805(a)(1). As discussed above, under proposed Rule 12805, an associated person may request expungement in a customer arbitration of a customer complaint or civil litigation associated with a customer's statement of claim. See supra note 43 and accompanying text.

⁸³ See proposed Rules 12805(a)(2)(D)(ii) and 12805(a)(2)(E)(ii).

customer arbitration, but is neither named in the arbitration nor is the subject of an on-behalf-of request, and the customer arbitration closes for any reason.⁸⁴ If an associated person requests expungement under proposed Rule 13805, a three-person panel randomly selected from the Special Arbitrator Roster in accordance with proposed Rule 13806 would decide the expungement request.⁸⁵

1. Filing a Straight-in Request Under the Industry Code

- a. Applicability

The process for initiating a straight-in-request for expungement of customer dispute information under the Industry Code would be governed, in part, by FINRA Rule 13302. This rule provides, in relevant part, that to initiate an arbitration, a claimant must file with the Director a signed and dated Submission Agreement, and a statement of claim specifying the relevant facts and remedies requested through the DR Party Portal (“Portal”).⁸⁶ Under proposed Rule 13805, an associated person requesting expungement of customer dispute information as a straight-in request under the Industry Code would be required to file a statement of claim, in accordance with the procedures contained in FINRA Rule 13302, against the member firm at which the person was associated at the time the customer dispute arose.⁸⁷ Under the proposed rule change, the Director would be authorized to deny the use of the DRS arbitration forum for the request if this connection is not present.⁸⁸

⁸⁴ See proposed Rule 13805(a)(1).

⁸⁵ See Notice at 50178.

⁸⁶ FINRA’s DR Portal, among other things, permits arbitration case participants to file an arbitration claim, view case documents, submit documents to FINRA and send documents to other Portal case participants, and schedule hearing dates. See FINRA Dispute Resolution Services, DR Portal, available at www.finra.org/arbitration-mediation/dr-portal.

⁸⁷ See proposed Rule 13805(a)(1).

⁸⁸ See proposed Rule 13203(b).

b. Required Content of Straight-in Requests

The required content of a straight-in request under the Industry Code would be the same as that required for expungement requests filed under the Customer Code.⁸⁹ Thus, the associated person's straight-in request would be required to contain the applicable filing fee;⁹⁰ the CRD number of the party requesting expungement; each CRD occurrence number that is the subject of the request; the case name and docket number associated with the customer dispute information, if applicable; and an explanation of whether expungement of the same customer dispute information was previously requested and, if so, how it was decided.⁹¹ In addition, as discussed below, the proposed rule change would impose limitations on when such requests may be made.⁹²

⁸⁹ See proposed Rule 13805(a)(3); see also Section II.A.1.a.ii, "Required Contents of an Expungement Request in Customer Arbitration."

⁹⁰ FINRA stated that it "would not assess a second filing fee when an associated person files a straight-in request if the associated person, or the requesting party in the case of an on-behalf-of request, had previously paid the filing fee to request expungement of the same customer dispute information during a customer arbitration." Notice at 50179 n.95.

⁹¹ See proposed Rule 13805(a)(3). If an expungement request under the Industry Code fails to include any of the proposed requirements for requesting expungement, the request would be considered deficient and would not be served unless the deficiency is corrected. See proposed Rule 13307(a).

⁹² See Section II.C., "Limitations on Expungement Requests." As discussed in more detail below, the straight-in request would be ineligible for arbitration under the Industry Code if: (1) a panel held a hearing to consider the merits of the associated person's request for expungement of the same customer dispute information; (2) a court of competent jurisdiction previously denied the associated person's request to expunge the same customer dispute information; (3) the customer arbitration or civil litigation or customer complaint associated with the customer dispute information is not closed; (4)(a) a panel or court of competent jurisdiction previously found the associated person liable in a customer arbitration or civil litigation associated with the same customer dispute information, or (b) the customer dispute information involves the same conduct that is the basis of a final regulatory action taken by a securities regulator or SRO; (5) more than two years have elapsed since the customer arbitration or civil litigation associated with the customer dispute information has closed; (6) there was no customer arbitration or civil litigation associated with the customer dispute information and more than three years have elapsed since the date that the customer complaint was initially reported to the CRD system; or (7) a named associated person is seeking expungement even though they

2. Panel from the Special Arbitrator Roster Decides Requests Filed Under the Industry Code

If an associated person files a straight-in request in accordance with proposed Rule 13805, a three-person panel randomly selected from the Special Arbitrator Roster pursuant to proposed Rule 13806 would be required to hold an expungement hearing, decide the expungement request, and issue an award.⁹³ The proposed rule change would provide that if the associated person withdraws or does not pursue the request, the panel would be required to deny the expungement request with prejudice.⁹⁴

a. Eligibility Requirements for the Special Arbitrator Roster

The proposed rule change would include several requirements to help ensure that arbitrators on the Special Arbitrator Roster have the qualifications and training to decide straight-in requests.

First, the proposed rule change would require arbitrators on the Special Arbitrator Roster to be public arbitrators who are eligible for the chairperson roster (“public chairperson”).⁹⁵ In general, public arbitrators are persons who are not employed in the securities industry and do not devote 20 percent or more of their professional work to the securities industry or to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry.⁹⁶ Arbitrators are eligible for the chairperson roster if they have completed

did not request expungement in the associated customer arbitration under proposed Rule 12805(a)(1)(A). See proposed Rule 13805(a)(2).

⁹³ See proposed Rule 13805(a)(4).

⁹⁴ See id. According to FINRA, “[t]his requirement would foreclose the ability of associated persons to withdraw expungement requests to avoid having their requests decided by a panel that they believe does not favor their request, and then seek to re-file the request with the hope of obtaining a potentially more favorable decision from a different panel.” Notice at 50179.

⁹⁵ See proposed Rule 13806(b).

⁹⁶ See Notice at 50170 n.3; see also FINRA Rules 12100(aa) and 13100(x).

chairperson training provided by FINRA and: (1) have a law degree and are either a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least one arbitration administered by a self-regulatory organization (“SRO”) in which hearings were held; or (2) have served as an arbitrator through award on at least three arbitrations administered by an SRO in which hearings were held.⁹⁷ FINRA stated that these requirements would help ensure that the persons conducting the expungement hearing are impartial and experienced in managing and conducting arbitration hearings in the DRS arbitration forum.⁹⁸

Second, the proposed rule change would require arbitrators on the Special Arbitrator Roster to have evidenced successful completion of, and agreement with, enhanced expungement training provided by FINRA.⁹⁹ FINRA currently provides an Expungement Training module for arbitrators.¹⁰⁰ This training, however, would be expanded for arbitrators seeking to qualify for the Special Arbitrator Roster.¹⁰¹

Third, the proposed rule change would require arbitrators on the Special Arbitrator Roster to have served as an arbitrator through award on at least four customer arbitrations administered by FINRA or by another SRO in which a hearing was held.¹⁰² FINRA stated that “if an

⁹⁷ See FINRA Rules 12400(c) and 13400(c). FINRA stated that for purposes of this proposed rule change, “public arbitrators who are eligible for the chairperson roster would include those arbitrators who have met the chairperson eligibility requirements of FINRA Rules 12400(c) or 13400(c), regardless of whether they have already served as a chair on an arbitration case.” Notice at 50179 n.102.

⁹⁸ See Notice at 50179.

⁹⁹ See proposed Rule 13806(b)(2)(A).

¹⁰⁰ See Notice at 50179.

¹⁰¹ See *id.*

¹⁰² See proposed Rule 13806(b)(2)(B). This requirement would not be satisfied by serving on arbitrations administered under the special proceeding option of the simplified arbitration rules. *Id.*; see also FINRA Rule 12800(c)(3)(B).

arbitrator has served on four arbitrations through to award, it would indicate that the arbitrator has gained the knowledge and experience in the DRS arbitration forum to conduct hearings.”¹⁰³

b. Composition of the Panel

The proposed rule change would require the Neutral List Selection System (“NLSS”)¹⁰⁴ to select randomly the three public chairpersons from the Special Arbitrator Roster to decide a straight-in request filed by an associated person.¹⁰⁵ The parties would not be permitted to agree to fewer than three arbitrators.¹⁰⁶ The parties requesting expungement also would not be permitted to strike any arbitrators selected by NLSS nor stipulate to their removal,¹⁰⁷ but would be permitted to challenge an arbitrator selected for cause.¹⁰⁸ If an arbitrator is removed, NLSS would randomly select a replacement.¹⁰⁹ FINRA stated that the proposed rule change would “prevent the associated person and member firm from collaboratively seeking to influence the outcome of the expungement request through arbitrator selection.”¹¹⁰

¹⁰³ Notice at 50179-80.

¹⁰⁴ NLSS is a computer algorithm used to generate lists of arbitrators on a random basis from DRS’s rosters of arbitrators for the selected hearing location.

¹⁰⁵ See proposed Rule 13806(b)(1). The first arbitrator selected would be the chair of the panel. See proposed Rule 13806(b)(3).

¹⁰⁶ See proposed Rule 13806(b)(5).

¹⁰⁷ See proposed Rule 13806(b)(4), as modified by Amendment No. 2. The parties also would not be permitted to stipulate to the use of pre-selected arbitrators (i.e., arbitrators that the parties find on their own to use in their cases). See proposed Rule 13806(b)(1).

¹⁰⁸ See proposed Rule 13806(b)(4). The Director may remove an arbitrator for conflict of interest or bias (i.e., “cause”) upon request of a party. The Director will grant a party’s request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be definite and capable of reasonable demonstration, rather than remote or speculative. See FINRA Rule 13410.

¹⁰⁹ See proposed Rule 13806(b)(4).

¹¹⁰ Notice at 50180. FINRA stated that “outside of the expungement context, the parties to an arbitration are typically adverse, which means that during arbitrator selection, each side may rank arbitrators on the lists whom they believe may be favorable to their case.

C. Limitations on Expungement Requests

Currently, the Codes provide minimal constraints on making expungement requests. FINRA Rules 12805 and 13805 do not address when a party would not be permitted to file an expungement request in the DRS arbitration forum.¹¹¹ The Guidance, however, describes circumstances in which an expungement request should be ineligible for arbitration. The proposed rule change would incorporate the limitations contained in the Guidance and add time limits to when an associated person may file a straight-in request.

1. Limitations Applicable to Both Straight-in Requests and Expungement Requests During a Customer Arbitration

The Guidance provides that if a panel or a court has issued an award or decision denying an associated person's expungement request, the associated person may not request expungement of the same customer dispute information in another arbitration proceeding. In particular, the Guidance states that arbitrators should ask a party requesting expungement whether an arbitration panel or a court previously denied expungement of the customer dispute information at issue and, if there has been a prior denial, the arbitration panel should deny the expungement request.¹¹²

The proposed rule change would codify the Guidance by providing that an associated person may not file a request for expungement of customer dispute information if: (1) a panel held a hearing to consider the merits of the associated person's expungement request for the same customer dispute information; or (2) a court of competent jurisdiction previously denied

The adversarial nature of the proceedings serves to minimize the impact of each party's influence in arbitrator selection. In contrast, a straight-in request filed by an associated person against a firm is less likely to be adversarial in nature." Id.

¹¹¹ But see infra note 127 (describing time limits that apply to all arbitration claims, including expungement requests).

¹¹² See supra note 6; see also Notice at 50180.

the associated person's request to expunge the same customer dispute information.¹¹³ According to FINRA, these proposed amendments would prevent an associated person from forum shopping, or seeking to return to the DRS arbitration forum to garner a favorable outcome on his or her expungement request.¹¹⁴

2. Limitations Applicable to Straight-in Requests Only

As discussed below, under the proposed amendments, four additional limitations would apply to straight-in requests.

a. No Straight-In Request If the Customer Arbitration, Civil Litigation or Customer Complaint Has Not Closed

The Guidance provides that an associated person may not file a separate request for expungement of customer dispute information arising from a customer arbitration until the customer arbitration has concluded.¹¹⁵ The proposed rule change would codify and expand upon this limitation by providing that an associated person may not file a straight-in request under proposed Rule 13805 if the customer arbitration, civil litigation or customer complaint associated with the customer dispute information has not closed.¹¹⁶ According to FINRA, the proposed rule change would, among other things, prevent an associated person from filing a straight-in request

¹¹³ See proposed Rules 12805(a)(1)(B)(i) and (ii) and 13805(a)(2)(A)(i) and (ii). The proposed rule change would require that the requesting party provide information about previous expungement requests and how such requests were decided. See proposed Rules 12805(a)(1)(C)(ii)e. and 13805(a)(3)(E).

¹¹⁴ FINRA stated that if a panel holds a hearing that addresses the merits of an associated person's request for expungement, the Director would be authorized to deny the DRS arbitration forum to any subsequent request by the associated person or another party on behalf of the associated person to expunge the same customer dispute information. See proposed Rules 12203(b) and 13203(b). See Notice at 50180 n.117.

¹¹⁵ See Notice at 50180; see also *supra* note 6.

¹¹⁶ See proposed Rule 13805(a)(2)(A)(iii).

while a customer arbitration or civil litigation associated with the customer dispute information that is the subject of the straight-in request is pending.¹¹⁷

b. Straight-in Request Prohibited if a Panel or Court of Competent Jurisdiction Previously Found the Associated Person Liable

Under the Codes, arbitration awards are final and binding unless vacated based on the limited grounds set forth in applicable state or federal statutes.¹¹⁸ The only avenue for challenging a prior adverse arbitration award is to file a timely motion with an appropriate court to vacate, modify, or correct the award.¹¹⁹ Thus, if an associated person is found liable in a customer arbitration, FINRA considers the associated person legally bound by the award and the Director will decline the use of the DRS arbitration forum if the associated person then requests expungement of customer dispute information that is associated with the customer arbitration in which the associated person was found liable. FINRA stated that it considers such expungement requests a collateral attack on the binding arbitration award, which is contrary to the Codes.¹²⁰ Accordingly, the proposed rule change would provide that an associated person shall not file a claim requesting expungement of customer dispute information from the CRD system if the customer dispute information is associated with a customer arbitration or civil litigation in which a panel or court of competent jurisdiction previously found the associated person liable.¹²¹

¹¹⁷ See Notice at 50180.

¹¹⁸ See *id.* at 50173.

¹¹⁹ See *id.* at 50173 n.33.

¹²⁰ See FINRA November 10 Letter at 28; FINRA Rules 12904(b) and 13904(b).

¹²¹ See proposed Rule 13805(a)(2)(A)(iv). Amendment No. 2 would modify the proposed rule change to provide that an associated person shall not file a claim requesting expungement of customer dispute information from the CRD system against a member firm at which the person was associated at the time the customer dispute arose if the customer dispute information involves the same conduct that is the basis of a final regulatory action taken by a securities regulator or SRO. If an associated person requests expungement of such customer dispute information, the Director will deny the DRS arbitration forum to the expungement request. See FINRA April 3 Letter at 14; see also *infra* note 430 and accompanying text. However, if an associated person is successful at

c. Straight-in Request Prohibited if Named Associated Person Did Not Request Expungement in Customer Arbitration

As discussed above, under proposed Rule 12805(a)(1)(A) an associated person who is named in a customer arbitration would be required to request expungement of associated customer dispute information during the arbitration or forfeit the ability to seek to expunge the customer dispute information associated with the customer's statement of claim in any subsequent proceeding.¹²² Proposed Rule 13805(a)(2)(A)(vii) would provide a mechanism to enforce the forfeiture established in proposed Rule 12805(a)(1)(A).¹²³ Specifically, proposed Rule 13805(a)(2)(A)(viii) would prohibit an associated person who is named, but failed to request expungement of the customer dispute information associated with the customer's statement of claim in a customer arbitration, from subsequently filing a straight-in request seeking to expunge this customer dispute information.¹²⁴

d. Time Limits Applicable to Disclosures Arising After the Effective Date of the Proposed Rule Change

FINRA Rules 12206(a) and 13206(a) require an associated person to submit a claim within six years from the occurrence or event giving rise to the claim. This six-year eligibility rule applies to all arbitration claims, including those requesting expungement of customer dispute information.¹²⁵ As a result, FINRA stated that many straight-in requests are filed many years after the customer arbitration closes or the customer complaint is reported in the CRD

appealing a final regulatory action, the associated person may file a claim requesting expungement of the customer dispute information involving the same conduct that is the basis of the final regulatory action, provided that the request is not otherwise ineligible for arbitration (e.g., that the request is time barred). See FINRA April 3 Letter at 14.

¹²² See proposed Rule 12805(a)(1)(A); see also Section II.A.1.a., "Expungement Requests by a Respondent Named in a Customer Arbitration."

¹²³ See Notice at 50175.

¹²⁴ See proposed Rule 13805(a)(2)(A)(viii).

¹²⁵ See Notice at 50174 n.38.

system.¹²⁶ To encourage prompt filing of expungement requests, the proposed amendments would establish time limits for expungement requests that are specifically tied to the closure of customer arbitrations and civil litigations, or the reporting of customer complaints in the CRD system, as applicable.¹²⁷ The proposed rule change would allow an associated person to request expungement of customer dispute information associated with a customer arbitration or civil litigation—including any associated customer complaint disclosures—within two years after the customer arbitration or civil litigation closes.¹²⁸ If no customer arbitration or civil litigation associated with the customer complaint is filed, the associated person would have three years from the date the customer complaint was initially reported in the CRD system to file the expungement request.¹²⁹ If a customer arbitration is filed after a panel has issued an award on a

¹²⁶ See id. at 50181.

¹²⁷ See proposed Rules 13805(a)(2)(A)(vi) and (vii). FINRA Rules 12206 and 13206 provide that no claim shall be eligible for submission to arbitration where six years have elapsed from the occurrence or event giving rise to the claim. Under these Rules, the panel has discretion to determine if the claim, including an expungement request, is eligible for arbitration. See supra note 125. As discussed below, under the proposed rule change, requests to expunge customer dispute information that arose up to six years prior to the effective date of the proposed rule change would continue to be eligible for expungement but would need to be filed within two or three years, as applicable. See proposed Rule 13805(a)(2)(B).

¹²⁸ See proposed Rule 13805(a)(2)(A)(vi). FINRA stated that with respect to requests to expunge customer dispute information associated with a customer arbitration, an associated person would be permitted to file a straight-in request under this two-year time limitation only if expungement of the customer dispute information was not required to be decided during the customer arbitration. See Notice at 50181 n.126. FINRA stated that a two-year limitation period would allow the associated person sufficient time to determine whether to seek expungement by filing a straight-in request and provide a sufficient amount of time for the associated person to gather the documents, information and other resources required to file the expungement request. In addition, a two-year period would help ensure that the expungement hearing is held close enough in time to the customer arbitration or civil litigation, when information regarding the customer arbitration or civil litigation is available and in a timeframe that could increase the likelihood for the customer to attend and participate if the customer chooses to do so. See Notice at 50181.

¹²⁹ See Notice at 50181. FINRA stated that the three-year time limitation would help ensure that the expungement hearing is held close in time to the events that gave rise to the customer dispute and increase the likelihood of customer attendance and participation.

request to expunge a customer complaint associated with the newly filed customer arbitration, the proposed rule would provide that the prior expungement award shall not be admissible in the customer arbitration.¹³⁰

The proposed rule change would also establish time limits for requests to expunge customer dispute information arising from customer arbitrations and civil litigations that close, and for customer complaints that were initially reported to the CRD system, on or prior to the effective date of the proposed rule change.¹³¹ Specifically, the proposed rule change would provide that if an expungement request is otherwise eligible under the six-year limitation period of FINRA Rule 13206(a),¹³² an associated person would be permitted to file a straight-in request under the Industry Code if: (1) the request for expungement is made within two years of the effective date of proposed rule change, and the disclosure to be expunged is associated with a customer arbitration or civil litigation that closed on or prior to the effective date;¹³³ or (2) the request for expungement is made within three years of the effective date of the proposed rule change, and the disclosure to be expunged is associated with a customer complaint initially reported to the CRD system on, or prior to, the effective date.¹³⁴

3. Director's Authority to Deny the Forum

Three years should also provide sufficient time for firms to complete their investigation of the complaint, for associated persons to develop a sense of whether the complaint may evolve into an arbitration or civil litigation, and for the associated person to gather the necessary resources and determine whether to seek expungement. See id.

¹³⁰ See proposed Rules 12604(c) and 13604(c). FINRA stated that the proposed rule change would avoid unfairly impacting the customer arbitration. See also Notice at 50181.

¹³¹ See Notice at 50182.

¹³² The Codes provide that no claim shall be eligible for submission to arbitration where six years have elapsed from the occurrence or event giving rise to the claim. See FINRA Rules 12206(a) and 13206(a).

¹³³ See proposed Rule 13805(a)(2)(B)(i).

¹³⁴ See proposed Rule 13805(a)(2)(B)(ii).

The proposed rule change would require the Director to decline the use of the DRS arbitration forum if an associated person files an expungement request that the Director determines is ineligible for arbitration under proposed Rules 12805 and 13805.¹³⁵ The proposed rule change would also provide the Director with authority to decline the use of the DRS arbitration forum if the Director determines that the expungement request was not filed under, or considered in the DRS arbitration forum in accordance with, proposed Rules 12805 or 13805.¹³⁶ FINRA stated that the proposed rule change would help ensure additional safeguards around the expungement process by expanding the circumstances in which the Director is authorized to deny the DRS arbitration forum.¹³⁷

D. Procedural Requirements Relating to All Expungement Hearings

FINRA Rules 12805 and 13805 currently provide a list of requirements panels must follow in order to issue an award containing expungement relief.¹³⁸ In addition, the Guidance recommends that arbitrators follow certain practices when deciding expungement requests. The proposed rule change would amend the current expungement hearing requirements by

¹³⁵ See proposed Rules 12203(b) and 13203(b). For example, FINRA stated that under the proposed rule change the Director would decline the use of the DRS arbitration forum if: (1) an expungement request is ineligible under the proposed time limitations; (2) a panel has previously considered the merits of, or a court has previously decided, an expungement request associated with the same customer dispute information; (3) an associated person was named as a respondent in a customer arbitration but did not request expungement; (4) an associated person requested expungement but withdrew or did not pursue the expungement request; or (5) a party to a customer arbitration requested expungement on behalf of an unnamed person but the party withdrew or did not pursue an expungement request on behalf of the unnamed person. See Notice at 50182.

¹³⁶ See proposed Rules 12203(c) and 13203(c). For example, FINRA stated that the Director may decline the use of the DRS arbitration forum if the Director determines that: (1) a panel is proposing to issue an award containing expungement of customer dispute information other than pursuant to proposed Rules 12805, 12800(d) and (e) or 13805, as applicable; or (2) an associated person seeks expungement of customer dispute information other than pursuant to proposed Rules 12805, 12800(d) and (e) or 13805, as applicable. See Notice at 50182.

¹³⁷ See Notice at 50182.

¹³⁸ See supra note 31.

incorporating relevant provisions from the Guidance. The proposed amended requirements would apply to all expungement hearings.¹³⁹

1. Recorded Hearing Sessions

The Codes currently require a panel deciding an expungement request to hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement.¹⁴⁰

The proposed rule change would provide that the panel would be required to hold one or more separate recorded hearing sessions regarding the expungement request, clarifying that the panel would not be limited in the number of hearing sessions it should hold to decide the expungement request. The proposed rule change would also eliminate the reference to the hearing being held by telephone or in person since the participants in the hearing may, under the proposed rule change, also appear by video conference; the proposed rule change would also allow different participants to attend using different methods (e.g., one by phone, one by video conference).¹⁴¹

2. Requesting Party's Appearance

The proposed rule change would require the associated person whose information in the CRD system is the subject of the expungement request to appear in person or by video conference at the expungement hearing and eliminate the ability to appear via telephone.¹⁴² The proposed rule change would also require a party requesting expungement on behalf of an unnamed person or the party's representative to appear in person or by video conference at the

¹³⁹ See proposed Rules 12805(c) and 13805(c). The proposed requirements for expungement hearings would apply to expungement hearings held during a customer arbitration under proposed Rule 12805, a simplified customer arbitration under proposed Rule 12800 (see Section II.G., "Expungement Requests During Simplified Customer Arbitrations") and a straight-in request under proposed Rule 13805, unless otherwise specified. See Notice at 50182 n.137.

¹⁴⁰ See FINRA Rules 12805(a) and 13805(a).

¹⁴¹ See proposed Rules 12805(c)(1) and 13805(c)(1).

¹⁴² See proposed Rules 12805(c)(2) and 13805(c)(2).

hearing.¹⁴³ The panel would determine the method of appearance.¹⁴⁴ FINRA stated that requiring that attendance be in person or by video conference would help the panel assess the associated person's credibility.¹⁴⁵

3. Customer's Attendance and Participation during the Expungement Hearing

The Guidance states that it is important to allow customers and their representatives to participate in the expungement hearing if they wish to do so.¹⁴⁶ Specifically, the Guidance provides that arbitrators should:

- Allow the customer and their representative to appear at the expungement hearing;
- Allow the customer to testify (telephonically, in person, or by other method) at the expungement hearing;
- Allow the representative for the customer or a pro se customer to introduce documents and evidence at the expungement hearing;
- Allow the representative for the customer or a pro se customer to cross-examine the associated person or other witnesses called by the party seeking expungement; and
- Allow the representative for the customer or a pro se customer to present opening and closing arguments if the panel allows any party to present such arguments.

The proposed rule change would codify these provisions of the Guidance.¹⁴⁷

¹⁴³ See id.

¹⁴⁴ See id.

¹⁴⁵ See Notice at 50182.

¹⁴⁶ The Guidance states that arbitrators should permit customers and their counsel to participate in the expungement hearing. See supra note 6.

¹⁴⁷ See Notice at 50182-83.

Specifically, the proposed rule change would state that all customers whose customer dispute information is associated with the expungement request are entitled to attend and participate in all aspects of the prehearing conferences and the expungement hearing.¹⁴⁸ And the proposed rule change would provide that the customer could choose to attend and participate by telephone, in person or by video conference.¹⁴⁹

The proposed rule change would also specify certain parameters of the customer's participation.¹⁵⁰ First, the proposed rule change would provide that a customer or a customer's representative could introduce evidence during the expungement hearing.¹⁵¹ If the customer or customer's representative introduces any evidence at the expungement hearing, a party could state objections to the introduction of the evidence during the expungement hearing.¹⁵²

Second, the customer and the customer's witnesses would be allowed to testify at the expungement hearing and be questioned by the customer or customer's representative.¹⁵³ If a customer or their witnesses testify, the associated person or a party requesting expungement on behalf of an unnamed person would be allowed to conduct cross-examination.¹⁵⁴

¹⁴⁸ See proposed Rules 12805(c)(3)(A) and 13805(c)(3)(A). A prehearing conference is any hearing session, including an Initial Prehearing Conference, that takes place before the hearing on the merits begins. See FINRA Rules 12100(y) and 13100(w); see also FINRA Rules 12500 and 13500. Under the proposed rule change, all customers whose customer dispute information is associated with the straight-in request would be entitled to representation at prehearing conferences. See proposed Rule 13805(c)(4).

¹⁴⁹ See proposed Rules 12805(c)(3)(B) and 13805(c)(3)(B).

¹⁵⁰ See Notice at 50183.

¹⁵¹ See proposed Rules 12805(c)(5)(A) and 13805(c)(5)(A).

¹⁵² See *id.*

¹⁵³ See proposed Rules 12805(c)(5)(B) and 13805(c)(5)(B).

¹⁵⁴ See *id.*

Third, the customer or customer's representative would be permitted to state objections to evidence and cross-examine the associated person or party requesting expungement on behalf of an unnamed person and any other witnesses called during the expungement hearing.¹⁵⁵

Fourth, the customer or customer's representative would be permitted to present opening and closing arguments if the panel permits any party to present such arguments.¹⁵⁶

FINRA stated that customer attendance and participation during an expungement hearing would provide the panel with important information and perspective that it might not otherwise receive. In addition, by providing customers with options for how to attend and participate in hearings FINRA seeks to encourage customer attendance and participation.¹⁵⁷ However, FINRA also stated that the proposed rule should give the associated person or party requesting expungement on behalf of an unnamed person the opportunity to substantiate arguments in support of the expungement request.¹⁵⁸

4. Panel Requests for Additional Documents or Evidence

The proposed rule change would explicitly authorize a panel to request from the associated person, the party requesting expungement on behalf of an unnamed person, and the member firm at which the person was associated at the time the customer dispute arose, as applicable, any documentary, testimonial or other evidence that the panel deems relevant to the expungement request.¹⁵⁹ FINRA stated that this proposed rule change would help ensure that arbitrators have the information necessary to make an informed decision on an expungement

¹⁵⁵ See proposed Rules 12805(c)(5)(C) and 13805(c)(5)(C).

¹⁵⁶ See proposed Rules 12805(c)(5)(D) and 13805(c)(5)(D).

¹⁵⁷ See Notice at 50183.

¹⁵⁸ Id.

¹⁵⁹ See proposed Rules 12805(c)(6) and 13805(c)(7).

request, particularly in cases that settle before an evidentiary hearing or in cases where the customer does not attend or participate in the expungement hearing.¹⁶⁰

5. Review of Settlement Documents

Current FINRA Rules 12805(b) and 13805(b) provide that, in the event a customer dispute is resolved by settlement, the panel considering the expungement request must review the settlement documents and consider the amount of payments made to any party and any other terms and conditions of the settlement.¹⁶¹ The proposed rule change would retain this requirement.¹⁶²

In addition, the Guidance currently recommends that arbitrators inquire and fully consider whether a party conditioned a settlement of a customer dispute upon an agreement not to oppose the request for expungement in cases in which the customer does not attend or participate in the expungement hearing or the requesting party states that a customer has indicated that the customer will not oppose the expungement request.¹⁶³ The proposed rule change would codify the language in the Guidance,¹⁶⁴ in part, because conditioned settlements violate FINRA Rule 2081 and may be grounds to deny an expungement request.¹⁶⁵

¹⁶⁰ See Notice at 50183.

¹⁶¹ FINRA stated that the panel must review settlement documents that are related to the customer dispute information associated with the expungement request, regardless of whether the associated person was a party to the settlement. *Id.* at 50183 n.152.

¹⁶² See proposed Rules 12805(c)(7) and 13805(c)(8). FINRA Rule 2081 provides that no member firm or associated person shall condition or seek to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer's agreement to consent to, or not to oppose, the member's or associated person's request to expunge such customer dispute information from the CRD system. See also Prohibited Conditions Relating to Expungement of Customer Dispute Information FAQ, <https://www.finra.org/arbitration-mediation/faq/prohibited-conditions-relating-expungement-customer-dispute-information>.

¹⁶³ See Notice at 50184.

¹⁶⁴ See proposed Rules 12805(c)(7) and 13805(c)(8).

¹⁶⁵ See Notice at 50184.

6. Unanimous Decision to Issue an Award Containing Expungement Relief

Unlike arbitration cases generally, which may be decided based on a majority decision of the panel, the proposed rule change would require that the arbitrators agree unanimously to issue an award containing expungement relief.¹⁶⁶ The proposed amendments would also provide that in order to issue an award containing expungement relief, the panel must unanimously find that one or more of the grounds for expungement enumerated in the proposed rule has been established: (1) the claim, allegation or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or (3) the claim, allegation or information is false.¹⁶⁷ The proposed rule change would also state that the panel shall not issue, and the Director shall not serve, an award containing expungement relief based on any other grounds.¹⁶⁸ FINRA stated that these proposed rule changes would help ensure that expungement is awarded only in limited circumstances in accordance with the narrow standards in its rules.¹⁶⁹

¹⁶⁶ See proposed Rules 12805(c)(8)(A) and 13805(c)(9)(A). FINRA stated that when deciding a customer's claims, a majority decision of the arbitrators would continue to be sufficient. Notice at 50184 n.156.

¹⁶⁷ See proposed Rules 12805(c)(8)(A)(i) and 13805(c)(9)(A)(i). FINRA stated that current FINRA Rules 12805 and 13805 require that, in order to issue an award containing expungement of customer dispute information, the panel must indicate in the arbitration award which of the FINRA Rule 2080 grounds for expungement serves as the basis for its expungement order. See Notice at 50184; see also FINRA Rule 2080 (Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System). FINRA Rule 2080 is not part of the Codes, and the proposed rule change would not amend FINRA Rule 2080. FINRA explained that the proposed rule change would codify the grounds identified in FINRA Rule 2080(b)(1) as the exclusive grounds upon which an arbitration panel may issue an award containing expungement of customer dispute information from the CRD system. See Notice at 50184 at n.162.

¹⁶⁸ See proposed Rules 12805(c)(8)(A)(ii) and 13805(c)(9)(A)(ii).

¹⁶⁹ See Notice at 50184; see also *supra* note 25 and accompanying text.

7. Contents of the Expungement Award

The panel is currently required “to provide a ‘brief’ written explanation of the reasons for its finding that one or more of the [FINRA Rule 2080] grounds for expungement applies to the facts of the case.”¹⁷⁰ According to FINRA, the Guidance suggests that the panel’s explanation should be complete and not solely a recitation of one of the FINRA Rule 2080(b)(1) grounds or language provided in the expungement request.¹⁷¹ The proposed rule change would retain the requirement to provide the written explanation, but would remove the word “brief,” and would incorporate language from the Guidance that the panel’s explanation should identify any specific documentary, testimonial or other evidence on which the panel relied in awarding expungement relief.¹⁷² Thus, FINRA stated that under the proposed rule change, the panel would be required to provide enough detail in the award to explain its rationale for awarding expungement relief.¹⁷³

8. Evidentiary Weight of Decision Not to Attend or Participate

The proposed rule change would state that a panel shall not give any evidentiary weight to a decision by a customer or an authorized representative of state securities regulators (“authorized representative”) not to attend or participate in an expungement hearing when making a determination of whether expungement is appropriate.¹⁷⁴ FINRA stated that a customer or an authorized representative may not attend, participate in or appear at an expungement hearing for a variety of reasons that may be unrelated to the merits of the

¹⁷⁰ See Notice at 50184; see also FINRA Rules 12805(c) and 13805(c).

¹⁷¹ See Notice at 50184.

¹⁷² See proposed Rules 12805(c)(8)(B) and 13805(c)(9)(B).

¹⁷³ See Notice at 50184.

¹⁷⁴ See proposed Rules 12805(c)(8)(C) and 13805(c)(9)(C); see also Amendment No. 1; see also Section II.F., “Attendance and Participation of an Authorized Representative of State Securities Regulators in Straight-in Requests” (discussing the attendance and participation in straight-in requests of an authorized representative of state securities regulators).

expungement request. Accordingly, a customer's or an authorized representative's decision not to attend or participate should not be given any evidentiary weight by the panel when making the expungement determination.¹⁷⁵

9. Forum Fees

The proposed rule change would retain the current requirements in FINRA Rules 12805(d) and 13805(d) that address how DRS arbitration forum fees are assessed in expungement hearings. Specifically, the proposed rule change would state that the panel must assess against the parties requesting expungement all DRS arbitration forum fees for each hearing session in which the sole topic is the determination of the appropriateness of expungement.¹⁷⁶

E. Notifications to Customers and to State Securities Regulators Regarding Expungement Requests

1. Notification to Customers by the Associated Person

According to FINRA, the Guidance suggests that when a straight-in request is filed against a firm, arbitrators order the associated person to provide a copy of the statement of claim to the customers involved in the customer dispute that gave rise to the customer dispute information maintained in the CRD system.¹⁷⁷ The proposed rule change would codify this practice in the Industry Code by requiring the associated person to serve all customers whose customer arbitrations, civil litigations or customer complaints are a subject of the expungement request with a copy of the statement of claim requesting expungement and any answer.¹⁷⁸ The

¹⁷⁵ See Notice at 50185; see also FINRA November 10 Letter at 10-11.

¹⁷⁶ See proposed Rules 12805(c)(9) and 13805(c)(10).

¹⁷⁷ See Notice at 50185; see also *supra* note 6.

¹⁷⁸ See proposed Rule 13805(b)(1)(A)(i) and (ii). This proposed requirement would apply to straight-in requests filed under the Industry Code; notice to customers would not be necessary for requests filed under proposed Rule 12805 of the Customer Code as the customer would be a named party. See Notice at 50185 n.168.

associated person would be required to serve a copy of the statement of claim and a copy of any answer within 10 days of filing.¹⁷⁹ The panel would be authorized to decide whether extraordinary circumstances exist that make service on the customers impracticable.¹⁸⁰

The proposed rule change also would require the associated person to file with the panel proof of service for the statement of claim and any answers, copies of all documents provided by the associated person to the customers, and copies of all communications sent by the associated person to the customers and any responses received from the customers.¹⁸¹

FINRA stated that providing notification to customers would help ensure that the customers know about the expungement request and have an opportunity to attend and participate in the expungement hearing or provide a position in writing regarding the associated person's request. FINRA also stated that requiring the panel to review all documents that the associated person used to inform the customers about the expungement request as well as any customer responses received would help ensure that the associated person does not attempt to dissuade a customer from attending or participating in the expungement hearing.¹⁸²

2. Notifications to the Customer by the Director

The proposed rule change would require the Director to notify all customers whose customer arbitrations, civil litigations or customer complaints are a subject of the expungement request, of the time, date and place of any prehearing conferences and the expungement hearing.¹⁸³ The Director would also provide the notified customers with access to all documents

¹⁷⁹ See proposed Rules 13805(b)(1)(A)(i) and (ii).

¹⁸⁰ See id.

¹⁸¹ See proposed Rule 13805(b)(1)(A)(iv).

¹⁸² See Notice at 50185.

¹⁸³ See proposed Rule 13805(b)(1)(B)(i). This requirement would apply to straight-in requests filed under the Industry Code; notice to customers would not be necessary for requests filed under proposed Rule 12805 of the Customer Code as the customer would be a named party. See also Section II.G.3., "Customer Notification of Expungement

on the Portal related to the request for expungement prior to their attendance and participation in the expungement hearing.¹⁸⁴

3. Notifications to State Securities Regulators

The proposed rule change would require FINRA to notify state securities regulators, in the manner determined by the Director in collaboration with state securities regulators, of an expungement request within 15 days of receiving an expungement request.¹⁸⁵ FINRA stated that the proposed notification requirement would help ensure that state securities regulators are timely notified of expungement requests.¹⁸⁶

F. Attendance and Participation of an Authorized Representative of State Securities Regulators in Straight-in Requests

The proposed rule change would provide a mechanism for an authorized representative of a state securities regulator to provide their position or positions on an expungement request in writing or by attending and participating in the expungement hearing in person or by video

Hearings during Simplified Arbitrations” (discussing customer notification of expungement hearings in connection with simplified arbitrations). FINRA stated that the Director would be required to include language in the notice encouraging the customer to attend and participate in the expungement hearing. See Notice at 50185.

¹⁸⁴ See proposed Rule 13805(b)(1)(B)(ii); see also Notice at 50185. FINRA would provide customers with access to the documents through the Portal. The Portal has two parts: the DR Neutral Portal is for arbitrators and mediators serving on the Dispute Resolution roster, and the DR Party Portal is for arbitration and mediation case participants. Once registered on the Portal, parties may use the portal to, among other things, file an arbitration claim, view case documents, submit documents to FINRA and send documents to other portal case participants, and schedule hearing dates. See supra note 86. FINRA stated that these proposed rule changes would help encourage customer attendance and participation in the expungement hearing, which would help the panel fully develop a record on which to decide the expungement request. See Notice at 50185.

¹⁸⁵ See proposed Rules 12800(f)(1), 12805(b) and 13805(b)(2)(A). FINRA stated that it would make this notification in connection with expungement requests under the Customer and Industry Codes. Such notification could be achieved by notifying NASAA of the expungement requests. See Notice at 50185 n.176.

¹⁸⁶ See Notice at 50185.

conference.¹⁸⁷ The proposed rule change would limit attendance and participation by an authorized representative to straight-in requests.¹⁸⁸

The proposed rule change would also require the Director to provide state securities regulators with access to all documents relevant to: (1) the expungement request filed in the arbitration requesting expungement relief; and (2) any other customer arbitration brought under the Customer Code that is associated with the customer dispute information that is a subject of the expungement request.¹⁸⁹ Such access would be required to be provided at the same time as providing notification to state securities regulators of the straight-in request.¹⁹⁰

If the Director receives notification from an authorized representative no later than 30 days after the last answer is due that the authorized representative intends to attend and participate in the expungement hearing, the proposed rule change would require the Director to notify the authorized representative of the time, date and place of any prehearing conferences and the expungement hearing.¹⁹¹ Under proposed Rule 13805(c)(6), at the expungement hearing, the authorized representative would be permitted to: (1) introduce documentary, testimonial, or other evidence; (2) cross-examine witnesses; and (3) present opening and closing arguments if the panel allows any party to present such arguments.¹⁹² Under the proposed rule change, the

¹⁸⁷ See proposed Rule 13805(c)(6)(A).

¹⁸⁸ See Notice at 50185-86; see also proposed Rule 1305(c)(6). The proposed rule change would not allow an authorized representative to attend or participate in a customer arbitration where expungement has been requested; FINRA believes that such attendance or participation could substantially disrupt the customer's case and would be less impactful, as the panel hears the customer's evidence on the merits. See id. at 50186.

¹⁸⁹ See proposed Rule 13805(b)(2)(B).

¹⁹⁰ See id.; see also Notice at 50186. The state securities regulators' access to the documents would be subject to confidentiality restrictions. See proposed Rule 13805(b)(2)(B).

¹⁹¹ See proposed Rule 13805(b)(3).

¹⁹² See proposed Rule 13805(c)(6)(B).

other persons appearing at the expungement hearing could state objections to the authorized representative's evidence and cross-examine the authorized representative's witnesses.¹⁹³

According to FINRA, the authorized representative would not be considered a party to the proceeding and their attendance and participation would be limited to what is authorized by proposed Rule 13805(c)(6).¹⁹⁴ As such, an authorized representative would not be entitled to seek discovery from the parties through the DRS arbitration forum, file motions, or seek to postpone a hearing.¹⁹⁵ In addition, the proposed rule change provides that the panel would not be permitted to allow the attendance or participation of the authorized representative to materially delay the scheduling of the expungement hearing.¹⁹⁶

FINRA stated that allowing an authorized representative to attend and participate in straight-in requests may provide meaningful opposition to the expungement request, which might otherwise be unopposed, and thus help create a more complete factual record for the panel to rely upon to decide the expungement request.¹⁹⁷

G. Expungement Requests During Simplified Customer Arbitrations

FINRA Rule 12800, governing simplified arbitration,¹⁹⁸ was designed to make the DRS arbitration process less burdensome for customer arbitrations involving \$50,000 or less (exclusive of interest and expenses) by providing such customers with expedited procedures. Simplified arbitrations are decided on the pleadings and other materials submitted by the parties,

¹⁹³ See proposed Rule 13805(c)(6)(C).

¹⁹⁴ See Notice at 50186.

¹⁹⁵ See id. at 50186 n.182.

¹⁹⁶ See proposed Rule 13805(c)(6)(A).

¹⁹⁷ See Notice at 50186. FINRA also stated that NASAA and state securities regulators have a shared interest with FINRA in protecting the integrity of the information contained in the CRD system, as it is a crucial tool in their registration and oversight responsibilities. See id.

¹⁹⁸ See supra note 7 and accompanying text.

unless the customer requests a hearing.¹⁹⁹ Further, a single arbitrator from the public chairperson roster is appointed to consider and decide simplified arbitrations, unless the parties agree in writing otherwise.²⁰⁰

The customer who files a simplified arbitration determines how the claim will be decided. In particular, the customer has the option of having the case decided in one of three ways: (1) without a hearing (referred to as “on the papers”), where the arbitrator decides the case on the pleadings or other materials; (2) in an “Option One” full hearing, in which prehearings and hearings on the merits take place pursuant to the regular provisions of the Customer Code; or (3) in an “Option Two” special proceeding, whereby the parties present their case in a hearing to the arbitrator in a compressed timeframe, so that the hearings last no longer than one day.²⁰¹

FINRA Rule 12800 does not expressly address how an expungement request should be filed or considered during a simplified arbitration.²⁰² The proposed rule change would codify an associated person’s ability to request expungement when named as a respondent in a simplified arbitration, and for other parties to request expungement on behalf of an unnamed person. The proposed rule change would also establish procedures for requesting and considering expungement requests in simplified arbitrations that are consistent with the expedited nature of these proceedings.²⁰³

1. Requesting Expungement

¹⁹⁹ See FINRA Rule 12800(a).

²⁰⁰ See FINRA Rule 12800(b). The parties could agree to have a three-person panel decide the simplified case. For ease of reference, when discussing expungement requests in simplified arbitrations under the proposed rule change, this order uses the term “arbitrator,” unless otherwise specified, to mean either a panel or single arbitrator.

²⁰¹ See FINRA Rule 12800(c).

²⁰² See Notice at 50186.

²⁰³ See Notice at 50186, proposed Rules 12800(d) and (e).

The proposed rule change would permit a named associated person to request expungement, or a party to file an on-behalf-of request, during a simplified arbitration.²⁰⁴ Unlike in a non-simplified arbitration, if expungement is not requested during the simplified arbitration, the associated person would be permitted to request it as a straight-in request filed under the Industry Code.²⁰⁵

a. Request By a Named Associated Person During a Simplified Arbitration

Under the proposed rule change, an associated person named as a respondent in a simplified arbitration could request expungement during the arbitration of the customer dispute information associated with the customer's statement of claim, provided the request is eligible for arbitration.²⁰⁶ If a named associated person requests expungement during a simplified arbitration, the proposed rule change would require the request to be filed in an answer or a separate pleading requesting expungement.²⁰⁷ If the named associated person requests expungement in a pleading other than an answer, the request would be required to be filed within 30 days after the date FINRA notifies the parties of the appointment of the arbitrator.²⁰⁸ The

²⁰⁴ See proposed Rules 12800(d)(1) and (2).

²⁰⁵ See proposed Rule 12800(e)(2). See Section II.G.1.c., "No Expungement Request is Filed."

²⁰⁶ See proposed Rule 12800(d)(1)(A). The limitations that apply to expungement requests filed by a named associated person under proposed Rule 12805(a)(1)(B) would apply to requests made in simplified arbitration. See Notice at 50187 n.191. See Section II.C., "Limitations on Expungement Requests."

²⁰⁷ See proposed Rule 12800(d)(1)(B)(i). Pursuant to FINRA Rule 12303(a), a respondent's answer must be submitted within 45 days of receipt of the statement of claim. See Notice at 50187 n.192; see *supra* note 48 and accompanying text.

²⁰⁸ See proposed Rule 12800(d)(1)(B)(i). FINRA stated that when it notifies the parties that an arbitrator has been appointed, it informs the parties that they have 30 days from the date of notification to submit additional documents or other information before the case is submitted to the arbitrator. See Notice at 50187 n.193.

request would be required to include the same information as a request filed in a non-simplified arbitration.²⁰⁹

The arbitrator would be required to decide an expungement request that is filed by the associated person.²¹⁰ If an associated person withdraws or does not pursue the request after filing, the arbitrator would be required to deny the request with prejudice so that it could not be re-filed.²¹¹

b. Request By a Party On Behalf Of an Unnamed Person

Under the proposed rule change, the requirements for a party to file an on-behalf-of request during a simplified arbitration would be the same as the requirements for a named associated person filing an expungement request during a simplified arbitration. A named party would only be able to file an on-behalf-of request during a simplified arbitration with the consent of the unnamed person.²¹² As with on-behalf-of requests filed in customer arbitrations under proposed Rule 12805(a)(2), the unnamed person who would benefit from the expungement request would be required to consent to such filing by signing the Form.²¹³

²⁰⁹ See proposed Rules 12800(d)(1)(B)(i) and 12805(a)(1)(C)(ii). More specifically, the associated person's expungement request would be required to contain the applicable filing fee; the CRD number of the party requesting expungement; each CRD occurrence number that is the subject of the request; the case name and docket number associated with the customer dispute information; and an explanation of whether expungement of the same customer dispute information was previously requested and, if so, how it was decided.

²¹⁰ See proposed Rules 12800(d)(1)(B)(ii) and 12800(e)(1).

²¹¹ See proposed Rule 12800(d)(1)(C). FINRA stated this provision would limit arbitrator-shopping. See Notice at 50187.

²¹² See proposed Rule 12800(d)(2)(A).

²¹³ See proposed Rule 12800(d)(2). The request must also meet the same requirements as an on-behalf-of request filed under proposed Rule 12805(a)(2). See proposed Rules 12805(a)(1)(C)(ii), 12805(a)(2)(C)(ii) and 12805(a)(2)(D); see also Section II.A.1.b., "Expungement Requests By a Party Named in a Customer Arbitration on Behalf of an Unnamed Person."

The arbitrator would be required to decide an on-behalf-of request that is filed by the requesting party.²¹⁴ If the requesting party withdraws or does not pursue the on-behalf-of request after filing, the arbitrator would be required to deny the request with prejudice so that it could not be re-filed.²¹⁵

c. No Expungement Request is Filed

If expungement is not requested during a simplified arbitration under proposed Rule 12800(d), the associated person would be able to file a straight-in request under proposed Rule 13805 and have the request decided by a three-person panel randomly selected from the Special Arbitrator Roster.²¹⁶ The request would be subject to the limitations on whether and when such requests may be filed under the Industry Code.²¹⁷

2. Deciding Expungement Requests during Simplified Arbitrations

If expungement is requested during simplified arbitration, the arbitrator would be required to decide the expungement request, regardless of how the simplified arbitration closes (e.g., even if the arbitration settles).²¹⁸ Under the proposed rule change, how and when the

²¹⁴ See proposed Rules 12800(d)(2)(B)(ii) and 12800(e)(1).

²¹⁵ See proposed Rule 12800(d)(2)(C).

²¹⁶ See proposed Rules 12800(e)(2), 13805(a)(1) and 13806. FINRA stated that because there may be less information available for the arbitrator to evaluate an expungement request during a simplified arbitration—even when the simplified arbitration results in an award—the associated person would retain the ability to choose to file the request as a straight-in request under the Industry Code. This would allow the associated person to obtain and present evidence from the member firm at which they were associated at the time the customer dispute arose without interfering with the simplified customer arbitration process. See Notice at 50187 n.203 and accompanying text.

²¹⁷ See proposed Rule 12800(e)(2); see also Section II.C., “Limitations on Expungement Requests.”

²¹⁸ See proposed Rule 12800(e)(1). Simplified arbitration is a more streamlined arbitration process. See Notice at 50186. In part, a single arbitrator from the public chairperson roster is appointed to consider and decide simplified arbitrations, unless the parties agree in writing otherwise. Id.

expungement request is decided would depend on which option the customer selects to decide the simplified arbitration.²¹⁹

a. No Hearing or “Option Two” Special Proceeding

If the customer opts not to have a hearing or chooses an “Option Two” special proceeding, the arbitrator would decide the customer’s dispute first and issue an award.²²⁰ After the customer’s dispute is decided, the arbitrator would hold a separate expungement-only hearing to consider and decide the expungement request and issue a separate, subsequent award.²²¹

FINRA stated that the proposed rule change is designed to minimize any delays in resolving the customer arbitration and any delays in potential recovery that a customer may be awarded.²²²

b. “Option One” Full Hearing

If the customer chooses to have an “Option One” full hearing on their claim and it closes by award, the arbitrator would be required to consider and decide the expungement request during the customer arbitration and include the decision on the expungement request in the same award as the decision on the customer arbitration.²²³ This process would be the same as deciding an expungement request during a non-simplified customer arbitration that closes by award after a hearing, where the customer’s claim and expungement request are addressed during the customer arbitration.²²⁴

²¹⁹ See proposed Rule 12800(e).

²²⁰ See proposed Rule 12800(e)(1)(A).

²²¹ See *id.* The arbitrator must conduct the expungement hearing pursuant to proposed Rule 12805(c). The expungement award must meet the requirements of proposed Rule 12805(c)(8), and the DRS arbitration forum fees would be assessed pursuant to proposed Rule 12805(c)(9). See Notice at 50188 n.206.

²²² See Notice at 50188.

²²³ See proposed Rule 12800(e)(1)(B)(i).

²²⁴ See Notice at 50188.

If the customer arbitration closes other than by award or by award without a hearing, the arbitrator would be required to hold a separate expungement-only hearing to consider and decide the expungement request and issue a separate award containing the decision on the expungement request.²²⁵ The arbitrator would conduct a separate expungement-only hearing to develop the factual record and help the arbitrator make a fully informed decision on the expungement request.²²⁶

3. Customer Notification of Expungement Hearings during Simplified Arbitrations

The proposed rule change would require the Director to notify all customers from the simplified arbitration of a separate expungement-only hearing.²²⁷ FINRA stated that the Director's notice would provide the customers with timely notice of the expungement hearing so that the customers and their representatives may participate.²²⁸

H. Non-substantive changes

The proposed rule change would also amend the Codes to make non-substantive, technical changes to the rules impacted by the proposed rule change. For example, the proposed rule change would require the renumbering of paragraphs and the updating of cross-references in the rules impacted by the proposed rule change. In addition, the title of Part VIII of the Customer Code would be amended to add a reference to "Expungement Proceedings." Similarly, the title of Part VIII of the Industry Code would be amended to add a reference to "Expungement Proceedings" and "Promissory Note Proceedings." FINRA is also proposing to re-number current FINRA Rule 13806 (Promissory Note Proceedings) as new FINRA Rule 13807, without substantive change to the current rule language and to amend FINRA Rule 13214

²²⁵ See proposed Rule 12800(e)(1)(B)(ii).

²²⁶ See Notice at 50188.

²²⁷ See proposed Rule 12800(f)(2).

²²⁸ See Notice at 50188.

to change the cross references from Rules 13806(d)(1) and 13806(f) to Rules 13807(d)(1) and 13807(f), respectively. Finally, FINRA would also amend FINRA Rule 13600 to change the cross reference from Rule 13806(e)(1) to Rule 13807(e)(1).

III. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letters, and FINRA's responses to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.²²⁹ Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,²³⁰ which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission also finds that the proposed rule change is consistent with Section 15A(b)(5) of the Exchange Act,²³¹ which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

A. Requests for Expungement under the Customer Code

1. Expungement Requests by Respondents Named in Customer Arbitration

The proposed rule change to amend FINRA Rule 12805 would, in part, govern how and when named associated persons may request expungement during a customer arbitration. Among other things, the proposed rule change would require that a named associated person file a request for expungement of the customer dispute information associated with the customer's

²²⁹ In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²³⁰ 15 U.S.C. 78o-3(b)(6).

²³¹ 15 U.S.C. 78o-3(b)(5).

statement of claim in the customer arbitration or forfeit the ability to request expungement of the same customer dispute information in a subsequent proceeding.²³²

The proposed rule change would also dictate the method of and deadline for filing an expungement request.²³³ Under the proposed rule change, a named associated person would need to include their request for expungement in their answer to the customer's statement of claim or in a separate pleading requesting expungement.²³⁴ If the associated person includes their request in the answer, they must file the answer within 45 days of receipt of the statement of claim.²³⁵ If the named associated person requests expungement in a separate pleading requesting expungement, rather than the answer, they would need to file the pleading no later than 60 days before the first scheduled hearing begins.²³⁶

Finally, the proposed rule change would further prescribe the contents of an expungement request.²³⁷ For example, the proposed rule change would require the named associated person requesting expungement to explain whether expungement of the same customer dispute information was: (1) previously requested and, if so, (2) how it was decided.²³⁸

FINRA stated that requiring the named associated person to request expungement in the customer arbitration increases the likelihood that a panel will have input from all parties and access to all of the evidence, testimony and other documents to make an informed decision on

²³² See proposed Rule 12805(a)(1)(A).

²³³ See proposed Rule 12805(a)(1)(C)(i)

²³⁴ See id.

²³⁵ See FINRA Rule 12303(a).

²³⁶ See proposed Rule 12805(a)(1)(C)(i); see also supra notes 49-50 and accompanying text. See also Section II.A.1.a.i., "Method and Timing of Requesting Expungement in Customer Arbitration."

²³⁷ See proposed Rule 12805(a)(1)(C)(ii).

²³⁸ See proposed Rule 12805(a)(1)(C)(ii)e.

the expungement request.²³⁹ FINRA further stated that the potential costs that would be incurred by associated persons, arbitrators and the DRS arbitration forum if named associated persons file expungement requests are appropriate given the potential benefit of having customer input and a complete factual record for the panel to decide an expungement request.²⁴⁰ Moreover, FINRA stated that requiring the named associated person requesting expungement to explain whether expungement of the same customer dispute information was previously requested and, if so, how it was decided would further link the request to a specific case and help prevent multiple requests for expungement.²⁴¹

Finally, FINRA stated the proposed 60-day deadline would provide adequate time for: (1) the named associated person to assess the customer's case, the potential merits of an expungement request, and whether to file the request; and (2) the parties to a customer arbitration to prepare their expungement-related arguments, since the expungement issues will overlap with the issues raised by the customer's claim.²⁴²

Four commenters supported, and there was no opposition to, these aspects of the proposed rule change.²⁴³ One commenter stated that requiring an associated person to request expungement in a customer dispute matter, if the associated person is a party to the matter,

²³⁹ See Section II.A.1.a., “Expungement Requests by a Respondent Named in a Customer Arbitration.”

²⁴⁰ See Notice at 50175.

²⁴¹ See *id.* at 50176.

²⁴² *Id.*

²⁴³ See letters from Seth A. Miller, General Counsel, President, Advocacy & Administration, Cambridge Investment Research, Inc., to the Commission, dated September 6, 2022 (“Cambridge”) at 1-2; Melanie Senter Lubin, NASAA President and Maryland Securities Commissioner, North American Securities Administrators Association, Inc., to the Commission, dated September 6, 2022 (“NASAA September 6 Letter”) at 2-3; Scott Eichhorn, et. al., Acting Director, University of Miami Investor Rights Clinic, to the Commission, dated September 6, 2022 (“Miami”) at 2-3; William A. Jacobson, Esq., Clinical Professor, Cornell Law School, and Director, Cornell Securities Law Clinic, et. al., to the Commission, dated September 6, 2022 (“Cornell”) at 2.

reduces the need for additional hearings, filing fees, attorney fees, and other arbitration costs concerning the same parties and the same evidence.²⁴⁴ Three commenters supported the proposed rule change on the basis that it would allow the panel that heard all of the evidence, including the customer's evidence, to be best situated to decide the expungement request.²⁴⁵ One of these commenters stated that the requirement would prevent "arbitrator-shopping" (i.e., purposefully not raising, or withdrawing, an expungement request in an arbitration in order to file a request with a panel more likely to award expungement).²⁴⁶

The Commission believes that the proposed rule change should improve the integrity of the expungement process. Where a customer arbitration closes by award after a hearing, the panel's experience with the parties and the dispute, as well as the panel's review of the documents, testimony, and other evidence in connection with the arbitration, should leave the panel well positioned to make a decision regarding the related expungement request. Moreover, requiring the expungement request to be made within 45 days of receipt of the customer's statement of claim (if included in the answer) or no later than 60 days before the first scheduled hearing begins (if included in a pleading) should allow the requesting party a reasonable amount of time to make an informed decision about whether to request expungement while at the same time providing the parties with reasonable case-preparation time, since the expungement issues will likely overlap with the issues raised by the customer's claim.

Further, the content required for an expungement request under the proposed rule change, including the CRD occurrence number that is the subject of the request, the case name and docket number associated with the customer dispute information, and whether expungement of such information had previously been requested and any resolution thereof, should improve the

²⁴⁴ See Cambridge at 2.

²⁴⁵ See NASAA September 6 Letter at 2-3; Miami at 2-3; Cornell at 2.

²⁴⁶ See Cornell at 2.

expungement process by clearly documenting both the request and whether it repeats a previous request. The required content would provide the panel with information sufficient to understand who is requesting expungement and in connection with which customer dispute.²⁴⁷ In addition, requiring the party requesting expungement to explain whether expungement of the same customer dispute information was previously requested and, if so, how it was decided will help prevent parties from pursuing second requests for expungement, consistent with the proposed rule change prohibiting repeat requests, which is discussed in more detail below.²⁴⁸

2. Content and Timing of On-Behalf-of Requests in Customer Arbitration

As with expungement requests made by a named associated person, the proposed rule change would, in part, govern how and when an on-behalf-of request may be made during a customer arbitration. For example, proposed Rule 12805(a)(2)(C)(iii) would require the party making the request to file it no later than 60 days before the first scheduled hearing.

In addition, proposed Rule 12805(a)(2)(C)(ii) would require the party filing an on-behalf-of request to submit to the Director the Form signed by the unnamed person and a statement requesting expungement. As discussed above, by signing the Form the unnamed person would be: (1) consenting to the on-behalf-of request, (2) agreeing to be bound by the panel's decision on the on-behalf-of request, and (3) acknowledging their understanding that if the customer arbitration closes by award after a hearing, the unnamed person would be barred from filing a request for expungement for the same customer dispute information in a subsequent proceeding.²⁴⁹

²⁴⁷ See Notice at 50176.

²⁴⁸ See Section III.A.5., "Limitations Applicable to Straight-in Requests and Expungement Requests during a Customer Arbitration."

²⁴⁹ See Notice at 50177; see also Section II.A.1.b., "Expungement Requests by a Party Named in a Customer Arbitration on Behalf of an Unnamed Person."

Finally, proposed Rules 12805(a)(1)(C)(ii) and 12805(a)(2)(C)(i) would require the party requesting expungement on behalf of an unnamed person to provide: the applicable filing fee; the CRD number of the unnamed person; each CRD occurrence number that is the subject of the request; the case name and docket number associated with the customer dispute information; and an explanation of whether expungement of the same customer dispute information was previously requested and, if so, how it was decided.²⁵⁰

FINRA believes that requiring associated persons to sign and submit the Form would help address its concern that some associated persons are filing arbitration claims seeking expungement of the same customer dispute information that was the subject of a previous denial by a panel of an on-behalf-of request.²⁵¹ Specifically, requiring submission of the signed Form would help ensure that an unnamed person is aware of an on-behalf-of request.²⁵² In addition, by signing the Form, the associated persons would be acknowledging that, if the customer arbitration closes by award after a hearing and an expungement decision is made, the unnamed person would be barred from filing a request for expungement for the same customer dispute information in a subsequent proceeding.²⁵³

In addition, under the proposed rule change, on-behalf-of requests would resemble named associated person requests in timing (the proposed rule would require service on all parties no later than 60 days before the first scheduled hearing), and in content (an on-behalf-of request would be required to include the same elements as a named associated person request).²⁵⁴

²⁵⁰ See Notice at 50177.

²⁵¹ See id.

²⁵² See id.

²⁵³ See id.

²⁵⁴ See id. at 50176-77; see also Section III.A.1., “Expungement Requests by Respondents Named in Customer Arbitration.” The proposed rule change would not require that an on-behalf-of request be included in an answer or pleading requesting expungement

The Commission received no comment letters supporting or opposing this proposed rule change.

For reasons similar to those discussed above for expungement requests made by a named associated person in a customer arbitration, the Commission believes that these timing and content requirements should improve the integrity of the expungement process.²⁵⁵ In addition, the panel's decision would preclude the unnamed party from seeking expungement of the same customer dispute information in another forum by claiming their interests were inadequately represented in the hearing under the terms of the Form. Moreover, requiring the expungement request to be made no later than 60 days before the first scheduled hearing begins should allow the requesting party a reasonable amount of time to make an informed decision about whether to request expungement while at the same time providing the parties with reasonable case-preparation time, as the expungement issues will overlap with the issues raised by the customer's claim.

Further, the notice provided to the associated person pursuant to the requirement to submit the Form with the associated person's written consent should help ensure that the associated person is made aware of the on-behalf-of request and will likely help prevent inadvertent duplicative filings. The requirement that the associated person agree to be bound by the panel's decision on the request, and be barred from filing a request for expungement for the same customer dispute information, will help prevent the associated person from requesting expungement from a different panel if they are unsatisfied with the decision issued by the first panel. Such safeguards also help conserve resources and prevent inconsistent determinations.

(although it could be) as such requests are made on behalf of non-parties. See Notice at 50176.

²⁵⁵ See Section III.A.1., "Expungement Requests by Respondents Named in Customer Arbitration."

3. Deciding Expungement Requests during Customer Arbitrations

As stated above, the proposed rule change would treat customer claims that close by award after a hearing differently from customer claims that close other than by award (e.g., the case settles) or that close by award without a hearing. Where the customer's claim closes by award after a hearing, the proposed rule change would require the panel in a customer arbitration to consider and decide a request for expungement made during the proceeding. In addition, if the party requesting expungement withdraws or does not pursue the expungement request, the panel will be required to deny the expungement request with prejudice. FINRA stated that this change should make efficient use of the panel's familiarity with the case-in-chief, and help protect investors by precluding arbitrator-shopping by associated persons or those requesting expungement on their behalf.²⁵⁶

Conversely, where the customer's claim closes other than by award or closes by award without a hearing, the proposed rule change would preclude the panel that heard the customer claim from considering the ongoing expungement request.²⁵⁷ In such cases, the efficiency rationale becomes less compelling, and FINRA believes that such expungement requests are best considered as straight-in requests by a panel from the Special Arbitrator Roster, discussed in more detail below.²⁵⁸ These proposed rule changes are intended to protect investors by reducing opportunities for arbitrator-shopping and by providing arbitrators with special training and factual-development tools specific to the expungement context.²⁵⁹

²⁵⁶ See Notice at 50177. FINRA expressed concern that, absent this change, associated persons (or other requesters) might seek to withdraw and refile their expungement requests to avoid having the requests decided by the panel who heard evidence on the customer's arbitration claim (receiving a new list of arbitrators and a potentially more favorable decision). See *id.*

²⁵⁷ See *id.* at 50177-78.

²⁵⁸ See Section III.B., "Straight-in Requests under the Industry Code and the Special Arbitrator Roster."

²⁵⁹ See Notice at 50178 and 50194.

Two commenters supported the proposed requirement that the panel in a customer arbitration decide an expungement request where the customer arbitration closes by award after a hearing.²⁶⁰ These commenters reasoned that because the panel would have presided over the case-in-chief, assessing input from all involved parties, it is best situated to decide the expungement request.²⁶¹ Three commenters further supported the proposed requirement that, in the event an expungement request is withdrawn or not pursued, the panel would be required to deny the request with prejudice, reasoning that the proposed rule change would prevent arbitrator-shopping by discouraging requesting parties from withdrawing an expungement request in order to seek a potentially more favorable panel.²⁶²

Three commenters, however, suggested that associated persons should be able to voluntarily withdraw expungement requests without prejudice.²⁶³ One of these commenters stated that customers are free to withdraw claims without prejudice,²⁶⁴ while another argued that there is no evidence to support the claim that a person that withdraws an expungement request is doing so in the hopes of finding a more favorable panel.²⁶⁵ A third commenter stated that there are a number of valid and practical reasons for why a non-party associated person's request for

²⁶⁰ See letter from Christine Lazaro, Director of the Securities Arbitration Clinic and Professor of Clinical Legal Education, et. al., Securities Arbitration Clinic at St. John's University School of Law, to the Commission, dated September 6, 2022 ("St. John's") at 2; Cornell at 2.

²⁶¹ See id.

²⁶² See Cornell at 2; Miami at 4; St. John's at 3.

²⁶³ See letters from Dochtor D. Kennedy, President & Founder, AdvisorLaw, LLC, to the Commission, dated August 9, 2022 ("AdvisorLaw") at 2-3; Jennifer W. Burke, Esq., Hennion & Walsh, Inc., to the Commission, dated September 6, 2022 ("Hennion") at 6; Russell Del Toro, Esq., TCM, P.S.C., to the Commission, dated December 21, 2022 ("Del Toro").

²⁶⁴ See Hennion at 6.

²⁶⁵ See Advisorlaw at 2-3.

expungement may be withdrawn prior to final hearing (e.g., time and costs), and thus that it is inappropriate to penalize an associated person for withdrawing their expungement request.²⁶⁶

FINRA declined to amend the proposed rule change in response to comments. FINRA expressed concern that arbitrator-shopping and repeated attempts to seek expungement of the same customer dispute information are inconsistent with the arbitration process and threaten the integrity of the information in the CRD system because they permit parties to request expungement until they get a favorable response.²⁶⁷ FINRA highlighted the extent of its concern by pointing out that among the requests to expunge customer dispute information in arbitration from January 2016 through December 2021, FINRA identified 282 disclosures that were the subject of a previously withdrawn or denied requests to expunge.²⁶⁸ FINRA further stated, in response to a commenter's statement that an associated person may have valid and practical reasons for withdrawing an expungement request, that it is not in a position to determine or assess, on a case-by-case basis, the legitimacy of an associated person's reason for withdrawing an expungement request during a customer arbitration.²⁶⁹

Two commenters also supported the proposed requirement that expungement requests made during customer arbitrations that close other than by award or close by award without a hearing, be heard by a panel from the Special Arbitrator Roster.²⁷⁰ One of these commenters reasoned that the original arbitration panels do not get to hear the full presentation of the evidence on the merits of the underlying customer case and that customers or their

²⁶⁶ See Del Toro.

²⁶⁷ See FINRA November 10 Letter at 28-29.

²⁶⁸ See FINRA November 10 Letter at 29; see also FINRA April 3 Letter at 5.

²⁶⁹ See FINRA April 3 Letter at 5.

²⁷⁰ See letter from Michael S. Edmiston, PIABA President, Public Investors Advocate Bar Association, to the Commission, dated September 6, 2022 ("PIABA September 6 Letter" at 3 and St. John's at 2.

representatives have little incentive to attend and participate in an expungement hearing once their case has settled.²⁷¹

One commenter, however, contended that a named associated person who requests expungement during a customer arbitration that closes other than by award or that closes by award without a hearing should continue to be allowed to request an expungement-only hearing before the same panel from the customer arbitration.²⁷² Specifically, this commenter stated that, even in cases that are settled or dismissed, the panel has often had an opportunity to review the pleadings, participate in the disposition of discovery and other prehearing motions, and otherwise familiarize itself with the facts of the case.²⁷³ Furthermore, according to the commenter, permitting the same panel to decide an expungement hearing may be more efficient because, in many cases, the parties will have already researched and ranked the panel members and the expungement hearing will have been scheduled for the same day as the hearing on the merits.²⁷⁴ According to the commenter, already-scheduled expungement hearings would reduce scheduling issues and increase the likelihood of customer participation, as customers will have already set aside the time.²⁷⁵

FINRA considered these comments but declined to amend the proposed rule change.²⁷⁶ FINRA stated that, when a customer arbitration closes other than by award or by award without a hearing, the panel may not have heard the presentation of the evidence on the merits of the case.

²⁷¹ See PIABA September 6 Letter at 3.

²⁷² See letter from Kevin M. Carroll, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to the Commission, dated September 2, 2022 (“SIFMA September 2 Letter”) at 8.

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See FINRA November 10 Letter at 24.

In addition, FINRA stated that customers or their representatives have little incentive to attend and provide their interpretation of the facts in a subsequent expungement hearing once their case has settled.²⁷⁷ Because a customer arbitration that closes other than by award, or by award without a hearing, has the potential for an inadequately developed, or nonexistent, record, FINRA contended that the integrity of information in the CRD system would be better maintained by requiring a panel randomly selected from the Special Arbitrator Roster to hear and decide such expungement requests²⁷⁸. Furthermore, FINRA stated that requiring an associated person to file such an expungement request as a straight-in request under the Industry Code would strengthen the expungement process because the Special Arbitrator Roster panel deciding the request would have the experience, qualifications, and training necessary to help ensure the development of a more complete factual record;²⁷⁹ in addition, FINRA stated that the proposed rule change would make it easier for customers to participate in the expungement proceeding, further helping the panel establish a more complete factual record.²⁸⁰

The Commission believes the proposed rule changes are aimed at enhancing FINRA's expungement framework. On the one hand, they require a panel of arbitrators that has decided

²⁷⁷ See id. FINRA formed its Dispute Resolution Task Force ("Task Force"), whose members included representatives from the industry and the public with a broad range of interests in securities dispute resolution, to consider possible enhancements to the DRS arbitration and mediation forum. In 2015, the Task Force stated that "the majority of issues that arise in the expungement process are those involving settled cases that do not go to final resolution because in such cases: (1) the panel selected by the parties may not have heard the full merits of the customer dispute and, therefore, may not bring to bear any special insights in determining whether to grant an expungement request and (2) claimants or their counsel have little incentive to participate in an expungement hearing once their dispute has been settled." See Notice at 50174 n.37; see also Final Report and Recommendations of the FINRA Dispute Resolution Task Force (Dec. 16, 2015), available at <http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf>.

²⁷⁸ See FINRA November 10 Letter at 24.

²⁷⁹ See Notice at 50178, 80; see also Section III.B.3., "Straight-in Requests under the Industry Code and the Special Arbitrator Roster, The Special Arbitrator Roster."

²⁸⁰ See Notice at 50183; see also Section III.D.3., "Customer's Attendance and Participation During the Expungement Hearing."

the merits of a case to leverage their understanding of the case to decide any related expungement requests; the panel would be required to decide the request even if the requesting party withdraws or fails to present a case in support of the request—in which case the panel would deny the expungement request with prejudice. This is both efficient and helps protect investors by preventing those requesting expungement from withdrawing and refileing their request to obtain new arbitrators when unsatisfied with the original panel. On the other hand, when a case closes other than by award or closes by award without a hearing, the efficiency benefits of having the same panel decide the request (while not eliminated) are diminished. Moreover, the risk that the expungement hearing will not benefit from either a fully developed record or the adversarial process increases. For example, a case may settle before the record has had a chance to develop and a customer who has settled their claims may have little incentive to commit more time and resources in a subsequent expungement hearing. Rather than leave it to arbitrators in individual cases to decide whether they have enough information to proceed to hear an expungement request, FINRA has established uniform, separate procedures to help ensure the development of an adequate factual record in connection with every expungement request. The proposed rule changes also aim to help ensure that arbitrators deciding straight-in expungement requests have the training and tools to develop an adequate factual record, particularly in the absence of customer participation. Finally, the proposed rule change allows for the effective administration of the expungement process and provides certainty to the parties about when requests for expungement may be made.

The Commission recognizes that in some cases the arbitrators from a customer arbitration could bring to a related standalone expungement hearing insights gleaned from their engagement with a well-developed factual record. Nevertheless, the proposed rule changes help ensure that every expungement request benefits from an adequate factual record. Moreover, it arms arbitrators on the Special Arbitrator Roster with the expungement-specific training and procedural tools necessary to develop and understand the factual record, regardless of both the

state of the record prior to their involvement and the presence or absence of customers at the expungement hearing. Finally, it makes procedural improvements to facilitate customer participation in expungement hearings.

4. No Straight-in Requests against Customers or Intervening in Customer Arbitrations to Request Expungement

The proposed rule changes would prohibit an associated person from filing a straight-in request against a customer, and would prohibit unnamed persons from intervening in a customer arbitration and requesting expungement. FINRA stated that the proposed rule would help protect investors by preventing associated persons from interrupting, and thus delaying, customer cases, thereby safeguarding customer time and resources.²⁸¹

One commenter opposed the proposed prohibition against an associated person filing a straight-in request against a customer.²⁸² This commenter argued that permitting straight-in requests against customers would solve many of the issues addressed in the proposed rule change, including customer notice and participation.²⁸³

Two commenters objected to the proposed prohibition against expungement interventions by unnamed persons in customer arbitrations.²⁸⁴ One of these commenters stated that prohibiting an unnamed person from intervening to clear their name results in potentially false allegations remaining in the CRD for upwards of a year (i.e., until expungement can be awarded in the straight-in request and confirmed by a court).²⁸⁵ The other commenter stated that the rules should allow for the most fair, speedy, and inexpensive resolution of the matters and

²⁸¹ See Notice at 50178; see also Section II.A.2., “No Intervening in Customer Arbitrations to Request Expungement.”

²⁸² See Del Toro.

²⁸³ See *id.*

²⁸⁴ See AdvisorLaw at 4 and Del Toro.

²⁸⁵ See AdvisorLaw at 4.

recommended that the proposed rule change allow for a sub-proceeding between the intervening affected associated person and the parties where a separate award on the matter of expungement is issued by the same panel without affecting the resolution of the main award.²⁸⁶

FINRA declined to amend the proposed rule change in response to comments. In the Notice and in response to comments, FINRA stated that in circumstances where an associated person is neither a named party nor the subject of an on-behalf-of request, the associated person's conduct is unlikely to be fully addressed by the parties during the customer arbitration, and permitting the unnamed person's intervention could unnecessarily interrupt or delay resolution of the case.²⁸⁷ FINRA further stated that it does not believe that customers should be compelled to attend or participate in a separate proceeding to decide an expungement request after the customer has resolved their arbitration claim or civil litigation.²⁸⁸ FINRA also stated that the requirement that an associated person file a straight-in request against the member firm at which the person was associated at the time the customer dispute arose would help ensure that there is a connection between the respondent firm and the subject matter of the expungement request.²⁸⁹

The Commission believes that prohibiting straight-in requests against customers, and prohibiting expungement interventions by unnamed persons in customer arbitrations, as proposed, will protect investors by conserving their time, resources, and ability to make their case efficiently and without interruption. The Commission appreciates that this will require the associated person to wait until the customer claim has been resolved to initiate a straight-in expungement proceeding, but believes such a delay is reasonable to help ensure that the related

²⁸⁶ See Del Toro.

²⁸⁷ See FINRA November 10 Letter at 29; see also FINRA April 3 Letter at 5; see also Notice at 50178.

²⁸⁸ See FINRA April 3 Letter at 6.

²⁸⁹ See id. at 7.

customer arbitration can be resolved as expeditiously as possible. Moreover, the panel selected from the Special Arbitrator Roster deciding the expungement request would have the benefit of any final factual record from the related customer dispute.

5. Limitations Applicable to Straight-in Requests and Expungement Requests during a Customer Arbitration

The proposed rule change would provide that an associated person may not file a request for expungement of customer dispute information if: (1) a panel held a hearing to consider the merits of the associated person's expungement request for the same customer dispute information; or (2) a court of competent jurisdiction previously denied the associated person's request to expunge the same customer dispute information.²⁹⁰

FINRA stated that the proposed rule changes would prevent an associated person from forum shopping, or seeking to return to the DRS arbitration forum to garner a favorable outcome on their expungement request.²⁹¹ The Commission received no comment letters supporting or opposing this proposed rule change.

The proposed rule changes should help prevent an associated person, or firm seeking expungement on their behalf, from forum-shopping to garner a more favorable outcome on an expungement request. As such, the proposed rule change should help protect the integrity of the information in the CRD system.²⁹² In addition, the proposed rule change should promote more efficient use of resources by precluding duplicative claims.

²⁹⁰ See proposed Rule 12805(a)(1)(B).

²⁹¹ See Notice at 50180.

²⁹² The proposed rule change would give unnamed persons the authority to reject the on-behalf-of request to preserve their ability to request expungement on their own if they believe their interests would be insufficiently represented by the named firm requesting expungement on their behalf. See proposed Rule 12805(a)(2)(C) and (D).

B. Straight-in Requests under the Industry Code and the Special Arbitrator Roster

1. Filing a Straight-in Request

a. Form of a Straight-in Request

Proposed Rule 13805 would require an associated person to make any request to expunge disclosures of customer dispute information (other than requests made in a customer arbitration itself) as a straight-in request, and would limit the circumstances in which an associated person could request expungement.²⁹³ Specifically, proposed Rule 13805(a)(1) would require an associated person to make such an expungement request against the member firm with which they were associated at the time the customer dispute arose.²⁹⁴ FINRA stated that this requirement would help ensure that there is a connection between the respondent firm and the subject matter of the expungement request and that the panel selected from the Special Arbitrator Roster would be able to request evidence from the member firm with information that is relevant to the expungement request.²⁹⁵

Two commenters recommended that FINRA adopt an alternative for unnamed parties to request expungement other than by straight-in requests.²⁹⁶ For example, one of these

²⁹³ See Section II.B.1., “Filing a Straight-in Request Under the Industry Code.”

²⁹⁴ Proposed Rule 13805(a)(2) would bar an associated person from filing a straight-in request against a member firm where the request has previously been heard or denied, the relevant customer dispute has not been resolved, specified temporal limitations have passed, the associated person is prohibited from seeking expungement under Rule 12805(a)(1)(A) (for example, by failing to seek expungement in the customer arbitration), or a panel or court of competent jurisdiction previously found the associated person liable or the customer dispute information involves the same conduct that is the basis of a final regulatory action taken by a securities regulator or self-regulatory organization. See Section III.B.6., “Limitations Applicable to Straight-in Requests Only.”

²⁹⁵ See Notice at 50179.

²⁹⁶ See letter from Robin M. Traxler, Senior Vice President, Policy & Deputy General Counsel, Financial Services Institute, to the Commission, dated September 6, 2022 (“FSI”) at 5-6; letter from Josh Barber to the Commission, dated August 24, 2022 (“Barber”).

commenters recommended that FINRA establish a method for unnamed parties who “had no say in whether the [underlying] case should be settled.”²⁹⁷ Similarly, the other commenter expressed concern that an unnamed person may not be aware of a customer arbitration (or have input in the resolution of customer’s case) and thus may not be aware they need to make a straight-in request.²⁹⁸

FINRA responded that its existing rules help ensure that associated persons are aware of arbitration disclosures on their Forms U4 and U5.²⁹⁹ In addition, if a party to a customer arbitration is unwilling to file an on-behalf-of request or if a party files an on-behalf-of request and the arbitration settles, the proposed rule change would allow the associated person to seek expungement by filing a request to expunge the same customer dispute information as a straight-in request.³⁰⁰

Two commenters supported the proposed rule change regarding straight-in requests, but recommended that FINRA prohibit associated persons from filing a straight-in request to expunge multiple, unrelated requests in one arbitration claim.³⁰¹ According to one of these commenters, the practice of bundling expungement requests permits “gaming the system” by having such claims heard by “expungement-friendly arbitrators.”³⁰² One of these commenters further suggested that FINRA require a nexus between the hearing location and the conduct at issue so that customers and state regulators would have more of an incentive to participate.³⁰³

²⁹⁷ See Barber.

²⁹⁸ See FSI at 5-6.

²⁹⁹ See FINRA November 10 Letter at 30; see, e.g., FINRA Rule 1010(c)(2)(A)-(B) and FINRA By-Laws, Article V, Sections 3(a) and 3(b).

³⁰⁰ See FINRA November 10 Letter at 30.

³⁰¹ See PIABA September 6 Letter at 4-5; Miami at 4-5.

³⁰² See Miami at 4-5.

³⁰³ See *id.* at 6.

These commenters reasoned that these changes would prevent unnecessary complications for the panel considering the expungement request and provide a common set of facts for the panel to consider.³⁰⁴

FINRA responded that the proposed time limits for filing a request³⁰⁵ may curtail the common practice of bundling unrelated and aged expungement requests in one straight-in request; and the requirement under the proposed rule change that an associated person would be required to file a straight-in request against the member firm at which the person was associated at the time the customer dispute arose would help ensure that there is a connection between the respondent firm and the subject matter of the straight-in request. With respect to requiring a locational nexus, FINRA stated that the ability for a customer to attend and participate in an expungement hearing by telephone or by video conference should help address concerns about there being a connection between the hearing location and the allegation at issue.³⁰⁶ FINRA further stated that concerns about expungement requests being brought before expungement-friendly arbitrators should be mitigated by several proposed requirements to minimize the potential for associated person or broker-dealer influence in the arbitrator selection process for straight-in requests. For example, the proposed change would require FINRA's list selection algorithm to randomly select a three-person panel from the Special Arbitrator Roster and the parties would not be able to agree to fewer than three arbitrators, strike any arbitrators selected by the list selection algorithm or stipulate to their removal, or be permitted to stipulate to the use of pre-selected arbitrators.³⁰⁷ According to FINRA, "these requirements would help ensure that arbitrators on the Special Arbitrator Roster have the qualifications and training to decide straight-

³⁰⁴ See PIABA September 6 Letter at 5; Miami at 5-6.

³⁰⁵ See Section III.B.6., "Limitations Applicable to Straight-in Requests Only."

³⁰⁶ See FINRA November 10 Letter at 20.

³⁰⁷ See *id.* at 20-21.

in requests and that the arbitrators conducting the expungement hearings are impartial and experienced in managing and conducting arbitration hearings in the DRS arbitration forum.”³⁰⁸

The Commission believes the requirements set forth in the proposed rule change are designed to promote investor protection because it should enhance the integrity of the CRD system. The firm with which the person requesting expungement was associated at the time the dispute arose should have knowledge of the dispute and access to relevant documentary or other evidence.³⁰⁹ Thus, requiring that a straight-in request be filed against the member firm with which the person was associated at the time of the conduct would increase the likelihood that the firm would be in a position to contribute to the development of any record, including at the request of the panel.³¹⁰

Also, the practice of bundling multiple, unrelated claims should be largely curtailed by the proposed time limits and requirement that claims be filed against the member firm at which the person was associated at the time the customer dispute arose; and that the constraints on parties’ ability to influence the composition of the panel should minimize the use of pre-selected, expungement-friendly arbitrators.

Finally, associated persons should be aware of arbitration disclosures on their Forms U4 and U5.³¹¹ To the extent they are not, the proposed time limits (discussed below) provide associated persons a reasonable amount of time to become aware and seek expungement by

³⁰⁸ See id. at 21.

³⁰⁹ See Notice at 50179.

³¹⁰ Proposed Rule 13203(b) would provide the Director authority to deny the use of the forum to decide the request if the requisite connection between the associated person and the firm is not present. See Notice at 50179. In addition, proposed Rule 13805(a)(2) would impose limitations on when such requests may be made. See Section III.B.6., “Limitations Applicable to Straight-in Requests Only.”

³¹¹ See supra note 299.

filing a request to expunge the same customer dispute information as a straight-in request.³¹²

Thus, seeking expungement via a straight-in request, with the procedural safeguards discussed herein, should not unduly burden an associated person seeking expungement.

b. Content of a Straight-in Request

In addition, as with named associated person requests, the proposed rule change also would establish content requirements for straight-in expungement requests.³¹³ The required content of a straight-in request would be the same as those required for expungement requests filed under proposed Rule 12805.³¹⁴ Specifically, an associated person would be required to include the following in a straight-in request: the applicable filing fee; the CRD number of the party requesting expungement; each CRD occurrence number that is the subject of the request; the case name and docket number associated with the customer dispute information, if applicable; and an explanation of whether expungement of the same customer dispute information was previously requested and, if so, how it was decided.³¹⁵

The Commission received no comment letters supporting or opposing this proposed rule change.

The proposed form and content requirements are reasonable for straight-in requests. In particular, requiring an associated person to file their expungement request against the member firm with which they were associated at the time the customer dispute arose should provide the panel deciding the expungement request with another source of documents potentially pertinent to its consideration of the request. As such, it could help a panel establish a more complete

³¹² See supra note 300; see also Section III.B.6.b., “Limitations Applicable to Straight-in Requests Only, Time Limits for Expungement Requests.”

³¹³ See Notice at 50179.

³¹⁴ See proposed Rule 13805(a)(3); see also Notice at 50179; see also Section III.A.1., “Expungement Requests by Respondents Named in Customer Arbitration.”

³¹⁵ See proposed Rule 13805(a)(3); see also Notice at 50179.

factual record upon which to base an award. In addition, as discussed in more detail above, the content required for an expungement request under the proposed rule change, including the CRD occurrence number that is the subject of the request, the case name and docket number associated with the customer dispute information, and whether expungement of such information had previously been requested and any resolution thereof, should improve the expungement process by clearly documenting both the request and whether it repeats a previous request. The required content would provide the panel with information sufficient to know who is requesting expungement and the customer dispute with which it is connected. In addition, requiring the party requesting expungement to explain whether expungement of the same customer dispute information was previously requested and, if so, how it was decided will help prevent parties from pursuing second requests for expungement, consistent with the proposed prohibition against repeat requests.³¹⁶

2. Deciding Straight-in Expungement Requests

The proposed rule change would establish a new framework for arbitrators hearing straight-in expungement requests. The proposed rule change would require a three-person panel³¹⁷ to hold an expungement hearing, decide the expungement request, and issue an award in response to a straight-in request filed in accordance with proposed Rule 13805.³¹⁸ As with expungement requests decided in customer arbitration, the panel would be required to deny an expungement request with prejudice in cases in which an associated person withdraws or does not pursue the request. FINRA stated that requiring a panel to deny a request that is withdrawn

³¹⁶ See Section III.A.2., “Content and Timing of On-Behalf-of Requests in Customer Arbitration.”

³¹⁷ As discussed in more detail below, the three-person panel would be selected from the Special Arbitrator Roster pursuant to proposed Rule 13806. See Section III.B.3., “Straight-in Requests under the Industry Code and the Special Arbitrator Roster, The Special Arbitrator Roster.”

³¹⁸ See proposed Rule 13805(a)(4).

or not pursued would protect investors by preventing associated persons from withdrawing and refiling expungement requests until they obtain a panel whose composition they believe is more likely to deliver a favorable recommendation.³¹⁹

The Commission received no comment letters supporting or opposing this proposed rule change. However, as discussed above, the Commission received, and FINRA responded to, comments supporting and opposing similar procedures for deciding expungement requests during customer arbitration.³²⁰

The Commission believes that requiring a panel selected from the Special Arbitrator Roster to decide a straight-in expungement request and deny a claim that is withdrawn or not pursued, would help to prevent an associated person from undermining the enhanced expungement framework with this form of arbitrator-shopping.³²¹

3. The Special Arbitrator Roster

The proposed rule change would establish a Special Arbitrator Roster from which a three-person panel would be drawn to decide all straight-in expungement requests.³²² Proposed Rule 13806(b) would limit the Special Arbitrator Roster to arbitrators with specified experience and training. Specifically, the proposed rule change would limit the roster to public arbitrators who are eligible for the chairperson roster, have completed FINRA's enhanced expungement training, and have served as an arbitrator through award on at least four customer-initiated arbitrations administered by FINRA or by another SRO in which a hearing was held.³²³ In

³¹⁹ See Notice at 50179.

³²⁰ See Section III.A.3., "Deciding Expungement Requests during Customer Arbitrations."

³²¹ See Section III.A.3., "Deciding Expungement Requests during Customer Arbitrations" (discussing comments received regarding the proposed rule change's treatment of expungement claims that are withdrawn or not pursued).

³²² See proposed Rule 13806.

³²³ See id.; see also Notice at 50179-80.

proposing the rule, FINRA stated that these requirements would help ensure that arbitrators on the Special Arbitrator Roster: have the experience, qualifications, and training to conduct a fair and impartial expungement hearing; appreciate the unique, distinct role they play as expungement hearing arbitrators; and understand the limited circumstances in which expungement should be awarded.³²⁴

Once the Special Arbitrator Roster has been established, the proposed rule change would require that three members of that roster be selected at random to decide each expungement request filed under proposed Rule 13805.³²⁵ In addition, the first arbitrator selected would be the chair of the panel,³²⁶ the parties would not be permitted to agree to fewer than three arbitrators,³²⁷ and the parties would not be permitted to strike any arbitrators or to stipulate to their removal, but would be permitted to challenge an arbitrator selected for cause.³²⁸ In proposing the rule, FINRA stated that this process would minimize the potential for influence in the arbitrator selection process by the associated person and member firm, whose interests may be aligned.³²⁹

Four commenters supported the proposed rule change's establishment of a Special Arbitrator Roster, the selection of a panel from this roster for expungement requests under the Industry Code, and the restrictions on parties' ability to influence the panel's composition.³³⁰ Three of these four commenters supported the proposed rule change on the basis that the three-person panel would minimize the impact of unopposed expungement requests, facilitate expanded fact-finding during the expungement request, and that the prohibition on ranking and

³²⁴ See Notice at 50179-80.

³²⁵ See proposed Rule 13806(b).

³²⁶ See proposed Rule 13806(b)(3).

³²⁷ See proposed Rule 13806(b)(5).

³²⁸ See proposed Rule 13806(b)(4).

³²⁹ See Notice at 50180.

³³⁰ See Cambridge at 2; Cornell at 1-2; PIABA September 6 Letter at 3; St. John's at 2-3.

striking, or agreeing to arbitrators would reduce both the prevalence of arbitrator-shopping and repeat-player incentives for arbitrators (i.e., from choosing arbitrators who are historically more likely to award expungements).³³¹ The fourth commenter further stated that the proposed rule change would increase efficiency and decrease costs for all parties to the expungement matter, since the parties will no longer need to spend hours researching and ranking arbitrators to find the individuals most experienced at handling these issues.³³² In addition, one commenter also stated that the enhanced training to be received by the Special Arbitrator Roster would give associated persons fewer causes for removal of an arbitrator for cause.³³³

Five commenters, however, objected to the proposed rule change's limitations on ranking and striking arbitrators.³³⁴ One of these commenters stated that ranking and striking is "enjoyed by all other participants in FINRA arbitration proceedings"³³⁵ while another commenter similarly stated that customers have the ability to rank and strike arbitrators.³³⁶ A third commenter argued that because different arbitrators approach issues differently, there is a benefit to starting with a large pool of potential panelists and then letting the parties "winnow the pool."³³⁷

FINRA stated that currently, based on its experience with straight-in requests filed in the DRS arbitration forum, associated persons typically file straight-in request for expungement against the broker-dealer firm at which the associated person is currently employed.³³⁸ In such

³³¹ See Cornell at 1-2; PIABA September 6 Letter at 3; St. John's at 2-3.

³³² See Cambridge at 2.

³³³ See Cornell at 2.

³³⁴ See letter from Tosh Grebenik to the Commission, dated November 21, 2022 ("Grebenik"); letter from Ronald Beckner to the Commission, dated October 12, 2022 ("Beckner"); Del Toro; Advisorlaw at 2; Hennion at 6.

³³⁵ See AdvisorLaw at 2-3.

³³⁶ See Hennion at 6.

³³⁷ See Grebenik.

³³⁸ See Notice at 50174 n.41; FINRA April 3 Letter at 6.

instances, the proceeding is less likely to be adversarial in nature than if the associated person files an expungement request against a customer.³³⁹ For example, FINRA stated that a respondent firm may support the request for expungement because it has an interest in removing negative information from the associated person's CRD record.³⁴⁰ Accordingly, FINRA stated that it would not be appropriate to continue to use the current process for selecting arbitrators—striking and combining ranked lists—to select arbitrators to decide straight-in requests.³⁴¹ FINRA reasoned that in arbitrations that occur outside of the expungement context, the parties are typically adverse, which means that during arbitrator selection, each side may rank arbitrators on the lists whom they believe may be favorable to their case.³⁴² Therefore, the adversarial nature of the proceedings serves to minimize the impact of each party's influence in arbitrator selection.³⁴³ An adversarial proceeding is less likely to occur in straight-in requests.³⁴⁴ Thus, the proposed rule change would prevent associated persons and member firms from collaboratively seeking to influence the outcome of the expungement request through arbitrator selection.³⁴⁵

FINRA also recognized the potential for the proposed rule change to limit the associated person's and member firm's input on arbitrator selection for reasons that may be unrelated to whether the arbitrator would potentially be sympathetic to the expungement request, such as their perception of the arbitrator's competence or efficiency.³⁴⁶ However, FINRA stated that the

³³⁹ See FINRA November 10 Letter at 26-27; FINRA April 3 Letter at 5; Notice at 50180.

³⁴⁰ See id. at 50174.

³⁴¹ See FINRA November 10 Letter at 26; FINRA April 3 Letter at 5; Notice at 50180.

³⁴² See FINRA November 10 Letter at 26; FINRA April 3 Letter at 5; Notice at 50180.

³⁴³ See FINRA November 10 Letter at 26; FINRA April 3 Letter at 5; Notice at 50180.

³⁴⁴ See FINRA November 10 Letter at 26-27; FINRA April 3 Letter at 5; Notice at 50180.

³⁴⁵ See FINRA November 10 Letter at 27; FINRA April 3 Letter at 5; Notice at 50180.

³⁴⁶ See FINRA November 10 Letter at 27; FINRA April 3 Letter at 5; Notice at 50180.

higher standards that the arbitrators would be required to meet to serve on the Special Arbitrator Roster should mitigate the impact of the absence of party input on the selection of arbitrators.³⁴⁷ In addition, associated persons and member firms would still be permitted to challenge any arbitrator for cause.³⁴⁸

Given the potential lack of adverse parties in straight-in expungement requests, FINRA reasonably determined that the random selection of a set number of arbitrators is appropriate. Random arbitrator selection, along with other aspects of the proposed rule change (e.g., the requirement that a panel decide an expungement request that is filed by an associated person, and the prohibition on an associated person withdrawing and re-filing their expungement request), should help eliminate arbitrator-shopping and serve to protect investors and the integrity of information in the CRD system. In addition, parties would continue to be able to challenge and remove arbitrators for cause.

Several commenters also recommended that FINRA expand the pool of arbitrators eligible to serve on the Special Arbitrator Roster, in particular to allow for non-public arbitrators, stating that such a change would bring securities industry expertise to deciding expungement requests.³⁴⁹ One commenter suggested that industry participants who have worked as a general securities principal for a least five consecutive years, in the prior seven-year period, be eligible for inclusion on the Special Arbitrator Roster.³⁵⁰ This commenter also suggested that at least one person on each three-person panel be required to have securities industry experience either as a general securities principal or as an attorney who has the requisite five years' experience in state

³⁴⁷ See FINRA November 10 Letter at 27; FINRA April 3 Letter at 5.

³⁴⁸ See FINRA November 10 Letter at 27; FINRA April 3 Letter at 5.

³⁴⁹ See FSI at 4; Hennion at 6; Grebenik.

³⁵⁰ See FSI at 4.

or federal securities regulation or as a securities regulator.³⁵¹ Another commenter likewise recommended including the ability to have an industry arbitrator on any expungement panel where more than one arbitrator was required.³⁵² A third commenter argued that requiring one public arbitrator, one non-public arbitrator, and a chairperson that can either be public or non-public, would help create a diverse knowledge base and would help the panel make better, more informed decisions.³⁵³

Another commenter suggested not limiting the Special Arbitrator Roster to chair-qualified public arbitrators.³⁵⁴ This commenter stated that experience in understanding and appreciating the regulatory value of a customer complaint should be the most important qualification, thus concluding that the Special Arbitrator Roster should be expanded to include current and former state, federal and SRO securities regulators. This commenter further suggested that the most experienced arbitrators should not be on the Special Arbitrator Roster as they have exhibited bias in favor of granting expungements in the past.³⁵⁵

FINRA declined to amend the proposed rule change in response to these comments. FINRA stated that it “believes that having experienced public arbitrators, without significant ties to the financial industry, deciding straight-in requests would help achieve the goal of balancing

³⁵¹ Id.

³⁵² See Hennion at 6. Hennion further suggested that arbitrators should be required to pay for the training. See id. at 5. FINRA responded that it does not now, and will not in the future, charge arbitrators for any arbitrator training. See FINRA November 10 Letter at 25.

³⁵³ See Grebenik. This commenter further suggested that the enhanced expungement training should be made public and be neutral rather than “persuasive” in an attempt to prevent panels from granting expungement. Id. FINRA responded that like other arbitrator training provided by DRS, the proposed training will be neutral and informative and it will be publicly available on FINRA’s website. See FINRA April 3 Letter at 4 n.10. The Commission believes that FINRA has addressed the commenter’s suggestion.

³⁵⁴ See letter from Celiza Braganca, President, et. al., The PIABA Foundation, to the Commission, dated September 6, 2022 (“PIABA Foundation September 6 Letter”) at 2-3.

³⁵⁵ See id.

the competing interests in the expungement process of providing a fair process and ensuring that information about associated persons that is available to investors is accurate.”³⁵⁶ Such arbitrators would be provided training that is neutral and informative and the training would be made publicly available on FINRA’s website. Moreover, FINRA stated that the enhanced training that arbitrators on the Special Arbitrator Roster would be required to take (as well as the other eligibility requirements) would help ensure that arbitrators on the Special Arbitrator Roster have the qualifications and training to appropriately decide straight-in requests and that the persons conducting the expungement hearings are impartial and experienced in managing and conducting arbitration hearings in the DRS arbitration forum.³⁵⁷

The Commission believes that FINRA reasonably determined which arbitrators would be eligible to serve on the Special Arbitrator Roster. Specifically, limiting eligibility to public arbitrators reasonably balances the competing interests in the expungement process of providing a fair process and ensuring the integrity of the information in the CRD system. This approach should also enhance the public’s perception that the expungement process and rules are fair, which, in turn, should enhance the perception of the integrity of the information on the CRD system. In addition, the proposed eligibility requirements should help ensure that experienced arbitrators are deciding expungement requests in light of the public interest in the integrity of the information in the CRD system.

4. State Attendance and Participation in Straight-In Expungement Requests

The proposed rule change would provide a mechanism for an authorized representative of a state securities regulator to present the state securities regulator’s position on an expungement request in writing or by attending and participating in the expungement hearing in person or by

³⁵⁶ FINRA November 10 Letter at 25.

³⁵⁷ See FINRA November 10 Letter at 25-26; see also FINRA April 3 Letter at 4-5.

video conference.³⁵⁸ The proposed rule change would limit the authorized representative's ability to attend and participate to only straight-in requests, where the panel may otherwise only hear evidence from the party requesting expungement.³⁵⁹ To facilitate attendance and participation, the Director would notify the applicable state securities regulator (in a manner determined by the Director in collaboration with state securities regulators) and provide applicable information and documents related to the associated customer arbitration.³⁶⁰ In addition, under the proposed rule change, the panel would not be permitted to allow the attendance or participation of the authorized representative to materially delay the scheduling of an expungement hearing.³⁶¹

While an authorized representative of a state securities regulator would not be a party to the expungement hearing, the authorized representative would be permitted to: (1) introduce documentary, testimonial, or other evidence; (2) cross-examine witnesses; and (3) present opening and closing arguments if the panel allows any party to present such arguments.³⁶² The other persons appearing at the expungement hearing could state objections to the authorized representative's evidence and cross-examine the authorized representative's witnesses.³⁶³

In the Notice, FINRA stated that allowing an authorized representative to attend and participate in straight-in requests may provide meaningful opposition to the expungement request, which might otherwise be unopposed, and thus help create a more complete factual record for the panel to rely upon to decide the expungement request.³⁶⁴ Moreover, FINRA

³⁵⁸ See proposed Rule 13805(c)(6)(A).

³⁵⁹ See Notice at 50185-86.

³⁶⁰ See proposed Rules 13805(b)(2)(A) and (B).

³⁶¹ See proposed Rule 13805(c)(6)(A).

³⁶² See proposed Rule 13805(c)(6)(B).

³⁶³ See proposed Rule 13805(c)(6)(C).

³⁶⁴ See Notice at 50186.

believes that state participation in straight-in requests is important in light of the importance of the CRD to state registration and oversight responsibilities.³⁶⁵

Seven commenters supported the proposed rule change's inclusion of state securities regulators in the expungement process.³⁶⁶ These commenters supported including a representative of a state securities regulator in straight-in expungement requests on the basis that such participation would serve to counterbalance a potentially unopposed expungement request since customers are less likely to participate in straight-in requests,³⁶⁷ and would therefore help protect the integrity of the information in the CRD system needed for the performance of state regulatory obligations.³⁶⁸ One commenter stated that while it appreciates the opportunity to appear for arbitration proceedings hearing expungement requests, state participation in such proceedings would be limited by resources and state-specific procedural hurdles that could inhibit the ability to appear.³⁶⁹

Five commenters expressed concern about permitting state securities regulator participation in straight-in expungement hearings.³⁷⁰ One of these commenters suggested that notification to state securities regulators should instead occur at the point FINRA seeks to obtain

³⁶⁵ See id.; see also NASAA September 6 Letter at 1 (stating that securities regulators depend on accurate information to make regulatory decisions).

³⁶⁶ See letter from Benjamin P. Edwards, Associate Professor of Law, University of Nevada, Las Vegas William S. Boyd School of Law, to the Commission, dated September 6, 2022 (“Edwards”) at 1-2; Miami at 6-7; PIABA September 6 Letter at 2; Cornell at 3; NASAA September 6 Letter at 3-4; PIABA Foundation September 6 Letter at 2; St. John’s at 3-4.

³⁶⁷ See PIABA Foundation September 6 Letter at 2; Miami at 6-7; Cornell at 3; Edwards at 1-2.

³⁶⁸ See PIABA September 6 Letter at 3; NASAA September 6 Letter at 3-4; Cornell at 3; St. John’s at 3-4.

³⁶⁹ See NASAA September 6 Letter at 3.

³⁷⁰ See letter from Michael Neal, Financial Advisor, M. A. NEAL Financial Services, to the Commission, dated August 31, 2022 (“Neal”); Hennion at 6; AdvisorLaw at 3; Beckner; Grebenik (supporting notification and attendance of state regulators, but opposing participation).

an order from a court of competent jurisdiction confirming an award containing expungement.³⁷¹ Another commenter objected to a non-party participating in an expungement proceeding without being subject to the forum's jurisdiction because: (1) a panel could not sanction a non-party for perjury, and (2) "increasing the barriers" to expungement would decrease the proceeding's efficiency.³⁷² A third commenter argued that participation of state securities regulators would increase costs.³⁷³

FINRA responded that state securities regulators are already notified about, and can participate in, proceedings at the state court confirmation level. FINRA Rule 2080 requires that FINRA be named as a party in such proceedings, unless this requirement is waived by FINRA. Upon receipt of a complaint naming FINRA or a request for a waiver from the requirement to name FINRA as an additional party, FINRA will notify NASAA of the complaint or waiver request. NASAA, in turn, will notify the appropriate state securities regulator.³⁷⁴ FINRA stated that under the proposed rule change FINRA would notify state securities regulators within 15 days of receiving a request for expungement, giving them time to review and decide whether to participate in a straight-in request, including in any prehearing conference.³⁷⁵

FINRA also responded that the arbitrators who would decide straight-in requests would have the experience, qualifications and training necessary to conduct a fair and impartial expungement hearing in accordance with the proposed rules and that the proposed rule change would provide an associated person requesting expungement the opportunity to cross-examine any witness called by a state securities regulator's authorized representative. FINRA stated that

³⁷¹ See Hennion at 6; see also supra notes 28-30.

³⁷² See AdvisorLaw at 3.

³⁷³ See Neal.

³⁷⁴ See FINRA November 10 Letter at 8 n.33.

³⁷⁵ See Notice at 50196 n.251 and accompanying text.

these mechanisms should be sufficient to help ensure that a non-party's testimony or documentary information presented is appropriately scrutinized.³⁷⁶ FINRA responded further by stating that concerns about state participation increasing costs to file an expungement request may be overstated, as under the proposed rule change the authorized representative would not be a party to the request, and thus, would not be permitted to take actions that could delay the proceeding or add to the parties' costs.³⁷⁷

FINRA acknowledged that in person attendance and participation by an authorized state representative may be limited given state resource constraints. FINRA pointed out that the proposed rule change provides low-cost options to help facilitate state participation; specifically, that it would permit the authorized representative to attend and participate via video conference or submit a state's position in writing.³⁷⁸

The Commission believes that permitting attendance and participation by state securities regulators in straight-in expungement proceedings, which have a higher likelihood of proceeding unopposed, and providing state regulators low-cost options to do so, will enhance the straight-in expungement process. Specifically, including state securities regulators and providing them with access to documents relevant to the expungement request provides them the opportunity to fulfill their own regulatory obligations, while at the same time increasing the likelihood that the panel in an expungement proceeding will hear evidence from multiple viewpoints, thus allowing the panel to make more informed decisions. At the same time, the conditions applicable to state securities regulator participation are designed so that they do not delay the resolution of an expungement request and allow the claimants the opportunity to challenge any information presented in the forum by the state's representative. As such, the proposed rule change

³⁷⁶ See FINRA November 10 Letter at 9-10.

³⁷⁷ See id. at 9; see also FINRA April 3 Letter at 8.

³⁷⁸ See FINRA November 10 Letter at 8; see also proposed Rule 13805(c)(6)(A).

appropriately balances the interests of state regulators in the expungement process, as well as their need to allocate and preserve resources, with the importance of maintaining an efficient and cost effective process for associated persons requesting expungement.

Two commenters recommended that FINRA extend the option for a state regulator's representative to participate in other expungement requests, including those in customer arbitration,³⁷⁹ and simplified arbitration.³⁸⁰ These commenters considered state participation in other contexts as providing a similar counterbalance as in a straight-in request because expungement requests in both customer arbitrations, whether standard or simplified, are similarly often unopposed because customers do not participate in that aspect of the proceeding.³⁸¹

FINRA declined to amend the proposed rule change in response to these comments. FINRA stated that attendance or participation in a customer arbitration could substantially disrupt the customer's case and would likely be less impactful, as the panel from the customer arbitration hears the customer's evidence on the merits.³⁸² Furthermore, in simplified arbitration the expungement-only hearing would likely be scheduled shortly after the customer's dispute is decided or closes, increasing the likelihood of customer attendance and participation. Thus, FINRA does not believe that it is necessary for state securities regulators to also attend and participate in expungement-only hearings in simplified arbitrations.³⁸³

The Commission believes that it is reasonable for FINRA to limit state securities regulator participation to straight-in requests where there is a higher likelihood of proceeding without meaningful opposition and state participation may provide the greatest benefit. In

³⁷⁹ See Edwards at 1-2.

³⁸⁰ See Miami at 6-7.

³⁸¹ See Edwards 1-2; see also Miami at 6-7.

³⁸² See FINRA November 10 Letter at 8.

³⁸³ See id. at 22.

customer arbitration, the panel will have the benefit of a balanced presentation of the merits of the case that should allow it to make an informed decision on the expungement request. Moreover, in simplified arbitration it is more likely that a customer will participate, providing their version of events, in an expungement hearing when it occurs soon after the panel makes an award based on the merits of the claim. Finally, FINRA stated it will continue to evaluate whether there are other ways to further strengthen the current expungement process, including whether to allow state securities regulators to attend and participate in separate expungement-only hearings in simplified arbitrations.³⁸⁴

5. Alternatives to Deciding Expungement Requests Through Arbitration

While expressing support for the proposed rule change, three commenters contended that expungement determinations are more appropriately a regulatory decision not properly adjudicated by FINRA's arbitration process.³⁸⁵ One of these commenters argued that the degree to which such records are preserved in CRD and BrokerCheck for all stakeholders should not turn on the varying abilities of any party – state securities regulator, authorized representative or customer – to appear to make an argument. According to the commenter, doing so would continue to lead to inconsistent results that have no relationship to the importance of this information.³⁸⁶

FINRA did not amend the proposed rule change in response to these comments. FINRA stated that it believes it is important to pursue a two-track approach to improving the expungement process. In the near term, FINRA stated the integrity of the information in the CRD system should be better protected by adopting the “substantial improvements” to the

³⁸⁴ See FINRA April 3 Letter at 18-19.

³⁸⁵ See PIABA September 6 Letter at 3-4; PIABA Foundation September 6 Letter at 2; NASAA September 6 Letter at 3-4.

³⁸⁶ See NASAA September 6 Letter at 3.

current expungement process that can be achieved with the proposed rule change.³⁸⁷

Concurrently, FINRA stated that it would continue working with NASAA and other interested parties to consider a redesign of the current expungement process.³⁸⁸

The proposed rule change is designed to strengthen the current expungement framework and to protect investors and the public interest. The proposed rule change's establishment of a special roster of specially qualified and trained arbitrators to decide certain expungement requests should help mitigate the potentially non-adversarial nature of straight-in expungement requests. In particular, the Commission believes that having three specially qualified and trained arbitrators available to ask questions and empowered to request evidence, along with the proposed rule change's inclusion of state securities regulators in straight-in requests where there may otherwise be no opposing viewpoint, should help ensure that a complete factual record is created upon which the arbitrators can base a decision in such expungement hearings. The proposed rule change also updates the Codes to incorporate provisions from FINRA Guidance that, among other things, facilitate customer attendance and participation in expungement hearings, permit panels to request additional documents or evidence relevant to an expungement request, and codify the grounds for awarding expungement.³⁸⁹ In addition, the Commission believes that continuing dialogue among FINRA, state regulators, industry participants, consumer advocates, and other stakeholders in the expungement process will lead to future improvements as the expungement process continues to evolve.

6. Limitations Applicable to Straight-in Requests Only

The proposed rule change also would codify and expand upon other aspects of the Guidance applicable to straight-in requests, in particular those related to eligibility to file the

³⁸⁷ See FINRA November 10 Letter at 6.

³⁸⁸ See *id.* at 6-7.

³⁸⁹ See Section III.D., "Procedural Requirements Relating to All Expungement Hearings."

request. For example, the proposed rule change would: prohibit an associated person from filing a straight-in request if the customer arbitration, civil litigation, or customer complaint that gave rise to the customer dispute information has not closed; establish time limits for expungement requests that are specifically tied to the close of customer arbitrations and civil litigations, or the reporting of customer complaints in the CRD system; and, prevent an associated person from filing an expungement request if (1) a panel or court of competent jurisdiction previously found the associated person liable in a customer arbitration or civil litigation associated with the same customer dispute information or (2) the customer dispute information involves the same conduct that is the basis of a final regulatory action³⁹⁰ taken by a securities regulator or SRO.³⁹¹

a. No Expungement Request until Underlying Case Closes

The proposed rule change would codify and expand upon the Guidance by providing that an associated person may not file a straight-in request if the customer arbitration, civil litigation, or customer complaint that gave rise to the customer dispute information has not closed, a limitation that is designed to prevent an associated person from obtaining a decision on an

³⁹⁰ FINRA stated that a “final regulatory action” includes any final action, including any action that is on appeal, by a securities regulator or SRO. See FINRA Rule 8312(c); see also Regulatory Notice 09-66 (November 2009) (stating that “actions that are delineated in current Form U4 Questions 14C, 14D or 14E will be considered ‘final regulatory actions.’ Similarly, actions that are detailed in current Form U5 Question 7D, and have a status of ‘final’ or ‘on appeal,’ will be considered ‘final regulatory actions’ as such actions are also addressed in Form U4.”). For example, a Letter of Acceptance, Waiver, and Consent and an accepted Offer of Settlement are two examples, among others, of final regulatory actions taken by FINRA. See FINRA Rule 9216(a)(4) and Rule 9270(g). A “final regulatory action” may also include a final action reported by a regulator on Form U6. See Regulatory Notice 09-66 (November 2009). See FINRA April 3 Letter at 14 n.49. For purposes of this proposed rule, a “final regulatory action” would not include a final action by a securities regulator or SRO that is dismissed, vacated or withdrawn. If, after dismissal, vacatur, or withdrawal of the final regulatory action, the associated person’s expungement request in the DRS arbitration forum would be ineligible pursuant to Rule 13805(a)(2) (e.g., because the request is time barred), the associated person could seek a court order directing expungement of the customer dispute information. See FINRA April 3 Letter at 14 n.52

³⁹¹ See Amendment No. 2; see also infra note 430 and accompanying text.

expungement request while the related customer dispute is ongoing.³⁹² FINRA stated this change would prevent potentially inconsistent expungement decisions on related customer dispute information and help ensure that the panel that would decide the straight-in request is able to consider the final factual record from the customer arbitration or civil litigation.³⁹³ The Commission received no comment letters supporting or opposing this proposed rule change.

The proposed rule change would help maintain the integrity of the information in the CRD system by helping to prevent inconsistent expungement decisions on related customer dispute information. The proposed rule change would also help ensure that the panel deciding the straight-in request is able to consider the final factual record from the customer arbitration or civil litigation.

b. Time Limits for Expungement Requests

Currently, FINRA Rules 12206(a) and 13206(a) require an associated person to submit an arbitration claim, including requests for expungement of customer dispute information, within six years from the occurrence or event giving rise to the claim.³⁹⁴ The proposed rule change would eliminate this six-year eligibility rule and instead establish shorter time limits for expungement requests that are specifically tied to the close of customer arbitrations and civil litigations, or the reporting of customer complaints in the CRD system, as applicable.³⁹⁵ FINRA

³⁹² See proposed Rule 13805(a)(2)(A)(iii); see also Notice at 50180.

³⁹³ See Notice at 50180.

³⁹⁴ See supra note 125 and 127 and accompanying text.

³⁹⁵ See Notice at 50181. As described above, the proposed rule change would prescribe different time limits in connection with customer arbitrations or civil litigations and customer complaints. In the case of a customer arbitration or civil litigation that gave rise to the customer dispute information in question, proposed Rule 13805(a)(2)(A)(iv) would require an associated person to file a straight-in request within two years of such matters closing. In the case of customer complaints, proposed Rule 13805(a)(2)(A)(v) would prohibit an associated person from filing a straight-in request where more than three years has elapsed from the time the complaint was first reported to the CRD system and there was no customer arbitration or civil litigation that gave rise to the customer dispute information. The proposed rule change would also establish similar time limits for

stated that the time periods provided for in the proposed rule changes for each situation would provide a sufficient amount of time for associated persons and their firms to, among other things, gather the documents, information, and other resources required to file the expungement request.³⁹⁶

With respect to customer arbitrations and civil litigations, FINRA stated that it believes the two-year period would help ensure that expungement hearings are held close enough in time to the customer arbitration or civil litigation such that information regarding the dispute is available and in a timeframe that could increase the likelihood of customer participation where a customer so chooses. The shorter timeframe, FINRA believes, should help encourage customer attendance and participation in expungement proceedings and help ensure that straight-in requests are brought before relevant evidence and testimony becomes stale or unavailable.³⁹⁷ Accordingly, FINRA believes the proposed time limit would help provide panels with more complete factual records on which to base their expungement decisions, while at the same time allowing the associated person adequate time to determine whether to seek expungement.³⁹⁸

With respect to customer complaints where there was no customer arbitration or civil litigation associated with the customer dispute information, FINRA stated that it believes that the three-year period would help ensure that the expungement hearing is held close in time to the events that gave rise to the customer dispute and increase the likelihood of customer attendance and participation. The three-year time limitation should also provide sufficient time for firms to

requests to expunge customer dispute information arising from customer arbitrations and civil litigations that close, and for customer complaints that were initially reported to the CRD system, on or prior to the effective date of the proposed rule change. See Notice at 50181-82; see also Section II.C.2.d., “Time Limits Applicable to Disclosures Arising After the Effective Date of the Proposed Rule Change.”

³⁹⁶ See Notice at 50181.

³⁹⁷ See id.

³⁹⁸ See id.

complete their investigation of the complaint, for associated persons to develop a sense of whether the complaint may evolve into an arbitration or civil litigation, and for the associated person to gather the necessary resources and determine whether to seek expungement. FINRA also believes that the three-year time limitation may curtail requests to expunge customer complaints that are filed many years after first being reported to the CRD system and the bundling of multiple unrelated and aged disclosures in a single expungement request.³⁹⁹

Six commenters supported the proposed time limitations.⁴⁰⁰ Two of these commenters stated that the time limitations will make it more likely that customers will participate⁴⁰¹ and one of these commenters stated that the timeframes provide enough time for associated persons to determine whether to file an expungement request and gather the relevant information to support their request.⁴⁰² Another commenter stated that the time limitations would increase the efficiency of the expungement process and decrease the cost to member firms because when expungement requests are filed “four or five or even ten years” after the event giving rise to the request, a party’s ability to respond to discovery requests and produce relevant information becomes much more difficult and time consuming.⁴⁰³

Seven commenters objected to the time period limitations.⁴⁰⁴ One commenter stated that time limits for filing an expungement request should mirror those provided to customers (a six-

³⁹⁹ See id.

⁴⁰⁰ See Miami at 5; Cambridge at 2; Cornell at 3-4; NASAA at 2; St. John’s at 3; PIABA September 6 Letter at 4.

⁴⁰¹ See Cornell at 4; St. John’s at 3.

⁴⁰² See Cornell at 3-4.

⁴⁰³ See Cambridge at 2.

⁴⁰⁴ See letter from James P. Galvin, Esq., Galvin Legal PLLC, to the Commission, dated April 7, 2023 (Galvin) at 2; Hennion at 6; AdvisorLaw at 3; Grebenik; Beckner; Del Toro; Barber.

year period of eligibility with expansion for good cause).⁴⁰⁵ This commenter argued that providing the associated person the opportunity to file for expungement within a six-year time frame—regardless of whether there was a customer-filed arbitration—recognizes that representatives may not have been meaningfully involved in the underlying arbitration for a variety of reasons (e.g., separation from the firm).⁴⁰⁶ Two other commenters stated that the amount of time that passes has no bearing on the merits of the expungement request.⁴⁰⁷ Another commenter stated that time limits may preclude expungement requests because associated persons are not aware of the expungement process and suggested grandfathering in associated persons with existing disclosures or sending notifications to such persons.⁴⁰⁸ Two other commenters stated that associated persons may lack the resources to seek expungement within the proposed two-year time limit.⁴⁰⁹ One of these commenters added that associated persons may not consider expungement important at the time only to change their minds later on in their careers; however, the commenter recommended that if FINRA moved forward with the two-year

⁴⁰⁵ See Hennion at 6. See also FINRA Rule 12206 (Time Limits) (stating that no claim shall be eligible for submission to arbitration under the Customer Code where six years have elapsed from the occurrence or event giving rise to the claim).

⁴⁰⁶ See Hennion at 6.

⁴⁰⁷ See AdvisorLaw at 3; Barber; see also letter from John O’Bannon, Financial Advisor, Diversified Financial Group, to the Commission, dated October 11, 2022 (stating that “[i]f a customer complaint is truly meritless, then the advisor should not continue to be potentially harmed by having there [sic] meritless disclosures continue to be on record.” And recommending: (1) that “[d]isclosures that were dropped by clients should be dropped by FINRA no later than 3 years after filing”; (2) allowing “[e]diting of [Form] U4 listings [to] correctly describe the issue and resolution [in a manner that does not] immediately give the negative connotation that the advisor is a cheat/liar if it’s not accurate”; and (3) establish “an expungement process for those convictions that [are more than 15 years old]”); see also Grebenik (stating that “FINRA should evaluate the complaint first to determine a basic level of legitimacy. Otherwise, the meritless and frivolous complaints will continue to be filed and will continue to be expunged at a high rate of success.”). These comments from O’Bannon and Grebnik are outside the scope of the proposed rule change.

⁴⁰⁸ See Grebenik.

⁴⁰⁹ See Galvin at 2; Del Toro.

time limit, it should ensure all associated persons affected by a given arbitration claim are given proper notice of the case's closure, as well as a description of any applicable time limits for making an expungement request.⁴¹⁰ Finally, one commenter that otherwise supported the proposed rule change argued that less time was necessary and urged FINRA to adopt a shorter, one-year time period for all straight-in expungement requests.⁴¹¹

FINRA considered these comments but declined to amend the proposed rule change. FINRA responded that it believes that the proposed time limitations appropriately address its concern that a number of expungement requests are currently filed many years after a customer arbitration closes or the reporting of a customer complaint in the CRD system.⁴¹² FINRA stated that requiring associated persons to file straight-in requests within three years of the filing of the customer complaint, rather than six, would help ensure that expungement hearings are held close in time to the events that led to the customer dispute information disclosure.⁴¹³ FINRA stated that, in turn, this may: (1) increase the likelihood of customer participation; (2) ensure that straight-in requests are filed before relevant evidence and testimony becomes stale or unavailable; and (3) generally help to develop a more complete factual record on which to decide an expungement request.⁴¹⁴

⁴¹⁰ See Del Toro.

⁴¹¹ See PIABA September 6 Letter at 4.

⁴¹² See FINRA November 10 Letter at 19. In response to a commenter's request that associated persons with existing disclosure be "grandfathered in" or provide notice, FINRA stated such "grandfathering" would be contrary to the purpose of the proposed rule change to address concerns about expungement requests made many years after the fact, and further stated that if the proposed rule change is approved, it would issue a Regulatory Notice that will provide notice to associated persons of when the time period will commence for seeking expungement of customer dispute information already on their records. See Grebenik; FINRA April 3 Letter at 11-12.

⁴¹³ See FINRA April 3 Letter at 10-11.

⁴¹⁴ See id. FINRA recognized that as a result of the three-year time limitation, an associated person may be prevented from filing a request for expungement of customer dispute information because the member firm's investigation of the customer complaint has not

FINRA also stated that allowing two years from the close of the customer arbitration or civil litigation to bring an expungement request would provide a reasonable amount of time for associated persons and firms to gather the necessary documents, information and other necessary resources required to file the expungement request and help ensure that the expungement hearing is held close enough in time to the customer arbitration. In addition, the two-year time limitation would reduce the potential for such information to become stale and increase the likelihood of customer participation.⁴¹⁵ Moreover, FINRA stated that it believes the three-year time period for expungement requests in connection with customer complaints would: (1) allow firms to complete their investigation of the customer complaint and close it in the CRD system; (2) allow associated persons to develop a sense of whether the complaint may evolve into an arbitration or civil litigation; and (3) allow associated persons to determine whether to proceed with a request to expunge the complaint.⁴¹⁶

FINRA acknowledged that there could be instances when associated persons may not be aware that a customer arbitration has closed, and that the two-year time limit for requesting expungement of customer dispute information has begun to run.⁴¹⁷ To facilitate an associated person's awareness of the proposed time limits, FINRA stated that if the proposed rule change is approved, it would issue a Regulatory Notice providing notice to associated persons of when the time period will commence for seeking expungement of customer dispute information already on their records. FINRA also stated it would update the cover letter that is provided by DRS to

concluded and, therefore, the customer complaint associated with the customer dispute information has not closed. However, FINRA stated that it believes that such instances would occur rarely. Furthermore, in the event that an associated person is prevented from filing a request for expungement of customer dispute information in the DRS arbitration forum because of the three-year time limitation, the associated person could seek a court order directing expungement of the customer dispute information. See id.

⁴¹⁵ See FINRA November 10 Letter at 19; FINRA April 3 Letter at 11-12 and n.39.

⁴¹⁶ See FINRA November 10 Letter at 19.

⁴¹⁷ See FINRA April 3 Letter at 9.

respondents once a statement of claim has been filed to explain that: (1) an associated person is prohibited from filing a straight-in request while a customer arbitration or civil litigation associated with the customer dispute information that is the subject of the straight-in request is pending; (2) an associated person is permitted to file a straight-in request within two years of the close of a customer arbitration or a civil litigation associated with the customer dispute information, unless such request is barred under the Industry Code; and (3) associated persons may remain apprised of the status of the customer arbitration, including case closure, by contacting the parties to the arbitration or DRS.⁴¹⁸ FINRA further stated that the updated cover letter would also encourage member firms to provide updates about the status of the customer arbitration to associated persons who are not named parties to the customer arbitration, including case closure.⁴¹⁹ Finally, FINRA stated it would publish guidance on its website about the changes to the Codes that would include information about how associated persons can remain apprised of the status of a customer arbitration, including through contacting DRS.⁴²⁰

FINRA's time limitations seek to balance two competing interests: (1) promoting customer participation and the availability of evidence and (2) providing sufficient time for an associated person to determine whether to seek expungement and, in the case of customer complaints, for firms to investigate and close a complaint and for the complaint to evolve, or not, into arbitration or civil litigation. The Commission believes that the proposed rule change strikes a reasonable balance between these competing interests. Holding expungement hearings closer in time to the event that gave rise to the customer dispute information should promote the availability of evidence and customer participation, which would help contribute to more

⁴¹⁸ Id.

⁴¹⁹ Id. at 9-10.

⁴²⁰ Id. at 10.

informed expungement determinations and therefore to investor protection and the integrity of information in the CRD system.⁴²¹

c. Preclusion of Certain Expungement Requests

The proposed rule change, as modified by Amendments No. 1 and No. 2, would also preclude an associated person from filing an expungement request if: (1) a panel or court of competent jurisdiction previously found the associated person liable in a customer arbitration or civil litigation associated with the same customer dispute information or (2) the customer dispute information involves the same conduct that is the basis of a final regulatory action⁴²² taken by a securities regulator or SRO.⁴²³

FINRA included the proposed preclusion of expungement requests where the associated person was previously found liable in a customer arbitration or civil litigation associated with the same customer dispute information as an amendment to its proposed rule change in response, in part, to a commenter's recommendation.⁴²⁴ FINRA reasoned that these expungement requests are in effect a collateral attack on the binding arbitration award and that a collateral attack is not contemplated under FINRA rules and is contrary to the Codes.⁴²⁵ FINRA stated that the only

⁴²¹ As stated above, the proposed rule changes would give the Director the express authority to deny the use of the DRS arbitration forum to decide expungement requests, including where the request is ineligible under the proposed time limitations. The Commission believes that these powers are a reasonable method to help ensure adherence to the limitations contained in proposed Rules 12805 and 13805.

⁴²² See supra note 390.

⁴²³ See proposed Rule 13805(a)(2)(A)(v).

⁴²⁴ See St. John's at 2 (suggesting that associated persons be prohibited from seeking expungement if there has been a finding of liability in the underlying customer arbitration). See Amendment No. 1; see also FINRA November 10 Letter at 28.

⁴²⁵ See FINRA November 10 Letter at 28; see also FINRA Rules 12904(b) and 13904(b).

avenue for challenging a prior adverse arbitration award is to file a timely motion with an appropriate court to vacate, modify, or correct the award.⁴²⁶

Two commenters supported the amendment.⁴²⁷ These commenters agreed that an arbitral or judicial finding that a claim is valid should preclude the ability to have such information expunged.⁴²⁸ A third commenter supported the amendment, but suggested the reason for the amendment would apply equally in other contexts, and recommended that associated persons should be prevented from seeking expungement of customer dispute information that forms the basis for a finding of liability in all of the contexts in which such information forms part of a regulatory record, such as state regulatory proceedings, proceedings brought by the Commission, or self-regulatory proceedings.⁴²⁹

After further consideration of the issue, FINRA proposed a modification to the proposed rule change in Amendment No. 2 to provide that an associated person shall not file a claim requesting expungement of customer dispute information from the CRD system against a member firm at which the person was associated at the time the customer dispute arose if the customer dispute information involves the same conduct that is the basis of a final regulatory action taken by a securities regulator or SRO. If an associated person requests expungement of such customer dispute information, the Director would deny the forum to the expungement

⁴²⁶ See FINRA November 10 Letter at 28.

⁴²⁷ See letters from Celiza P. Bragança, Past-President & Director, et. al., The PIABA Foundation, to the Commission, dated December 7, 2022 (“PIABA Foundation December 7 Letter”) at 2; see also Hugh D. Berkson, President, Public Investors Arbitration Bar Association, to the Commission, dated December 7, 2022 (“PIABA December 7 Letter”) at 2-3.

⁴²⁸ See id.

⁴²⁹ See letter from Andrew Hartnett, President, North American Securities Administrators Association, Inc., to the Commission, dated December 7, 2022 (“NASAA December 7 Letter”) at 3.

request.⁴³⁰ FINRA stated that prohibiting an associated person from filing such expungement requests would promote greater efficiency in the DRS arbitration forum because it would preclude requests that otherwise would be unsuccessful.⁴³¹

Permitting expungement following a finding of liability in an arbitration or civil litigation associated with the same customer dispute information or a final regulatory action based on the same conduct sought to be expunged would be inconsistent with the specified grounds that can form the basis for an expungement award under the proposed rule change (i.e., factual impossibility, mistake, or falsity). Permitting an expungement claim in these circumstances would, in addition to constituting a collateral attack on the results of the underlying dispute, contribute to inefficiencies in the expungement process by allowing for claims to proceed that could not succeed.

C. Expungement Requests during Simplified Arbitrations

1. Filing and Considering Requests during Simplified Arbitration

The proposed rule change would permit a named associated person to request expungement, or a party to file an on-behalf-of request, during a simplified arbitration,⁴³² and would establish procedures for requesting and considering expungement requests in simplified arbitrations that are consistent with the expedited nature of these proceedings.⁴³³

⁴³⁰ See FINRA April 3 Letter at 14; Amendment No. 2; see also proposed Rule 13203(b).

⁴³¹ See FINRA April 3 Letter at 13-14.

⁴³² See proposed Rule 12800(d)(1)(A). If the requesting party requests expungement in a pleading other than an answer, the request must be filed within 30 days from the date that FINRA notifies the associated person of arbitrator appointment. See proposed Rule 12800(d)(1)(B). When FINRA notifies the parties that an arbitrator has been appointed, FINRA informs the parties that they have 30 days from the date of notification to submit additional documents or other information before the case is submitted to the arbitrator. See Notice at 50187 n.193 and accompanying text. The request would be required to include the same information as a request filed in a non-simplified arbitration. See proposed Rules 12800(d)(1)(B)(i) and 12805(a)(1)(C)(ii); see also Notice at 50187.

⁴³³ See proposed Rules 12800(d) and (e); see also Notice at 50186. See Section II.A., “Requests for Expungement under the Customer Code.”

The proposed rule change would require an arbitrator in a simplified arbitration to decide an expungement request that is filed by an associated person or as an on-behalf-of request.⁴³⁴ In addition, as in the proposed rule change governing regular customer arbitration, under the proposed rule change if the requesting party withdraws or does not pursue the request after filing, the arbitrator would be required to deny the request with prejudice so that it could not be re-filed.⁴³⁵ FINRA stated that these proposed rule changes would help eliminate arbitrator-shopping by requiring the panel in which the request is made to decide the request.⁴³⁶ FINRA also stated that, unlike the proposed amendments to a regular customer arbitration, FINRA was not proposing that a panel from the Special Arbitrator Roster decide an expungement request made during a simplified customer arbitration where the arbitration closes other than by award or closes by award without a hearing, because the public chairpersons who decide simplified arbitrations would be fully capable of making appropriate expungement decisions on the basis of their experience and would have the same enhanced expungement training as the arbitrators on the Special Arbitrator Roster.⁴³⁷

In addition, unlike in a regular customer arbitration, if expungement is not requested during a simplified arbitration, the proposed rule change would permit the associated person to file a straight-in expungement request for the same customer dispute information under the Industry Code and have the request decided by a three-person panel randomly selected from the Special Arbitrator Roster.⁴³⁸

⁴³⁴ See proposed Rules 12800(d)(1)(B)(ii) and 12800(e)(1); see also Notice at 50187.

⁴³⁵ See proposed Rule 12800(d)(1)(C); see also Notice at 50187.

⁴³⁶ See Notice at 50187.

⁴³⁷ See Notice at 50188. Under the proposed rule change, the public chairperson would be required to evidence successful completion of, and agreement with, the enhanced expungement training provided by DRS prior to considering and deciding the expungement request. See also proposed Rule 12800(b).

⁴³⁸ See proposed Rule 12800(e)(2).

One commenter requested that a named associated person should be required to request expungement during the arbitration of the customer's claim, as proposed for non-simplified cases.⁴³⁹ The commenter stated that arbitrators in simplified arbitrations are experienced public arbitrators who have the same enhanced expungement training as the arbitrators on the Special Arbitrator Roster and would therefore be able to make an informed decision on the merits of an expungement request.⁴⁴⁰ The commenter also stated that requiring a named party to request expungement during the arbitration of the customer's claim in simplified arbitration would encourage customer participation because the expungement request would be closer in time to the complained-about conduct and therefore easier for the customer to recall the facts.⁴⁴¹

FINRA declined to amend the proposed rule change, referencing the expedited nature of simplified arbitrations.⁴⁴² FINRA stated that because there may be less discovery in simplified arbitration and the customer can dictate the extent of the evidence presented to the arbitrator, there may be less information available for the arbitrator to evaluate an expungement request.⁴⁴³ Accordingly, FINRA stated that it is appropriate that an associated person should retain the ability to choose to file the request as a straight-in request under the Industry Code.⁴⁴⁴ FINRA

⁴³⁹ See Miami at 2-3.

⁴⁴⁰ See Miami at 3-4. Similarly, Cornell requested that FINRA add to the proposed rule change that if an expungement is requested during a simplified arbitration and if the parties agree to have a specific arbitrator, this arbitrator must be required to undergo the enhanced expungement training provided to the arbitrators on the Special Arbitrator Roster prior to considering the expungement request. See Cornell at 4-5. In response, FINRA stated that the proposed rule change would require that arbitrators deciding expungement requests in simplified arbitrations be experienced public arbitrators who have taken the same expungement training as arbitrators on the Special Arbitrator Roster, including where the parties agree to a specific arbitrator. See FINRA November 10 Letter at 22.

⁴⁴¹ See Miami at 3-4.

⁴⁴² See FINRA November 10 Letter at 23.

⁴⁴³ See id.; see also Notice at 50187.

⁴⁴⁴ See Notice at 50187.

also stated, however, that it will continue to monitor expungement requests and decisions in simplified arbitrations to determine if additional changes are warranted, including whether a panel from the Special Arbitrator Roster should be required to decide an expungement request in simplified arbitrations.⁴⁴⁵

Requiring an arbitrator to decide an expungement request that is filed in a simplified arbitration, regardless of the outcome of that arbitration, along with requiring an arbitrator to a reject such a request with prejudice if it is withdrawn, will help protect the integrity of the information in the CRD system by limiting an associated person's ability to request expungement for the same claim (even if it has been denied in the past) until they find a panel willing to award it. By allowing an associated person to determine whether to request expungement in a simplified arbitration or to instead file the request as a straight-in request under the Industry Code, the proposed rule change appropriately puts the decision to seek expungement in the hands of the party most impacted by the outcome. Because claims in simplified arbitration generally are decided by one arbitrator based on the documents that are submitted by the parties, with limited discovery, and without a hearing, there may be less information available for the arbitrator to evaluate an expungement request during a simplified arbitration. Therefore, the Commission believes that associated persons should be given the choice of how they want to proceed with their request for expungement, while at the same time balancing customer and regulator interests in the process. The Commission notes, however, that FINRA has stated it will monitor this issue and propose changes as warranted.

2. Deciding Requests in Simplified Arbitration

As stated above, if expungement is requested during a simplified arbitration, the proposed rule change would require the arbitrator to decide the expungement request regardless of how the

⁴⁴⁵ See id.; see also FINRA April 3 Letter at 18-19.

simplified arbitration case closes, including by settlement, in one of two ways, depending on the how the customer chooses to have their claim decided.⁴⁴⁶

If the customer chooses to have their claim decided either (1) “on the papers” (i.e., without a hearing) or (2) in an “Option Two” special proceeding, the arbitrator would decide the customer’s dispute first and then issue an award before deciding the expungement request.⁴⁴⁷ After the customer’s dispute is decided, the arbitrator would hold a separate expungement-only hearing to consider and decide the expungement request and issue a separate award.⁴⁴⁸ FINRA reasoned that this requirement would minimize any delays in resolving the customer arbitration and in determining any potential recovery that a customer may be awarded.⁴⁴⁹ FINRA further stated that the separate expungement-only hearing would be necessary to enable the arbitrator to request any documentary, testimonial, or other evidence it deems relevant to the expungement request to make a fully informed decision.⁴⁵⁰

Alternatively, if the customer chooses to have their claim decided by an “Option One” full hearing and it closes by award, the proposed rule change would require the arbitrator to consider and decide the expungement request during the customer arbitration and include the decision in the award.⁴⁵¹ This process would be the same as deciding an expungement request

⁴⁴⁶ See Notice at 50187-88; see also proposed Rules 12800(d)(1)(B)(ii) and 12800(e)(1).

⁴⁴⁷ See proposed Rule 12800(e)(1)(A).

⁴⁴⁸ See proposed Rule 12800(e)(1)(A). The arbitrator would have to conduct the expungement hearing pursuant to proposed Rule 12805(c); the expungement award would have to meet the requirements of proposed Rule 12805(c)(8); and forum fees would be assessed pursuant to proposed Rule 12805(c)(9). See id.; see also Notice at 50188 n.206.

⁴⁴⁹ See Notice at 50188.

⁴⁵⁰ See id. FINRA stated that the customer arbitration may not be as fully developed when a customer has requested an “on the papers” or special proceeding. See id.

⁴⁵¹ See proposed Rule 12800(e)(1)(B)(i); see also Section III.A.3., “Deciding Expungement Requests during Customer Arbitrations.”

during a regular customer arbitration that closes by award after a hearing, where the customer's claim and expungement request are addressed during the customer arbitration.⁴⁵²

If a simplified arbitration closes other than by award or closes by award without a hearing, however, the proposed rule change would require the arbitrator to hold a separate expungement-only hearing to consider and decide the expungement request and issue a separate award containing the decision on the expungement request.⁴⁵³ Under the proposed rule change, the Director would notify all customers from the simplified arbitration of the separate expungement-only hearing, if applicable.⁴⁵⁴ FINRA believes that a separate expungement hearing would be necessary in these circumstances for the arbitrator to develop a complete factual record in order to make a fully informed decision on the expungement request.⁴⁵⁵ FINRA also believes that the Director's notice would further this objective by providing a timely reminder to customers of the expungement hearing so that they may plan and prepare to attend and participate if they choose.⁴⁵⁶ Moreover, FINRA stated that it would continue to monitor expungement requests and decisions in simplified arbitrations to determine if additional changes are warranted.⁴⁵⁷

Three commenters voiced support for the proposed rule change, specifically identifying the bifurcation of the expungement hearing and simplified arbitration where the customer's claim is decided "on the papers" or in an "Option Two" hearing.⁴⁵⁸ One of these commenters reasoned that by requiring a separate hearing on the expungement request following a final decision on the

⁴⁵² See Notice at 50188.

⁴⁵³ See proposed Rule 12800(e)(1)(B)(ii).

⁴⁵⁴ See proposed Rule 12800(f)(2).

⁴⁵⁵ See Notice at 50188.

⁴⁵⁶ See id.

⁴⁵⁷ See id.

⁴⁵⁸ See Miami at 2-3; St. John's at 2; Cornell at 4.

customer's claim, the proposed rule change would allow for a just resolution of the request because the arbitrator would have all of the facts and special insights necessary to decide whether to award expungement, while ensuring the resolution of the investor's claim is not delayed.⁴⁵⁹ Another commenter similarly stated that deciding the customer dispute before the request for expungement would minimize delays in customer recovery but allow the arbitrator to make a more fully developed record before deciding the expungement request.⁴⁶⁰

Another commenter suggested that FINRA create a simplified process for expungement with similar fees and an "on the papers" option before a single arbitrator for requests for expungement associated with customer complaints and customer arbitrations under \$50,000.⁴⁶¹ In response, FINRA declined to amend the proposed rule change, stating that an important part of ensuring the expungement process works as intended is for arbitrators to hold recorded expungement hearings during which they can hear testimony and assess the credibility of the associated person requesting expungement and any witnesses.⁴⁶²

The proposed rule change's procedure for determining the order in which a panel would decide an expungement request in a simplified arbitration based on the type of proceeding chosen by the customer is reasonable. For example, where a customer opts to have their claim decided without a hearing (i.e., "on the papers") or chooses an "Option Two" special proceeding, the arbitrator would hold a separate expungement-only hearing to consider and decide the expungement request after it decides the customer's dispute. The Commission believes that this process benefits both customers and associated persons. The customer would avoid any delay in resolving their claim that consideration of an expungement request would cause; and the

⁴⁵⁹ See St. John's at 2.

⁴⁶⁰ See Cornell at 4.

⁴⁶¹ See Hennion at 6.

⁴⁶² See FINRA November 10 Letter at 23.

associated person would have a separate hearing to help ensure that the arbitrator has sufficient evidence upon which to rule on their expungement request. Alternatively, where the customer chooses to have their claim decided after a full hearing (i.e., an “Option One” proceeding), it is reasonable to allow the panel to rule on an expungement request because the request would not unduly burden the customer or an associated person requesting expungement in the hearing. By choosing “Option One”, a customer has agreed to participate in a more involved and time-consuming process than having their claim decided “on the papers.” Likewise, the customer has assumed the risk that the resolution of their claim could be delayed by an associated person’s expungement request. In addition, the associated person gets an opportunity during the hearing to help the panel fully develop a record on which to decide the expungement request.

D. Procedural Requirements Relating to All Expungement Hearings

The proposed rule changes would include certain procedural provisions that would apply to all expungement hearings. As described above, these would include procedural requirements relating to: (1) hearing format; (2) associated person’s appearance; (3) customer attendance and participation; (4) panel requests for additional documents or evidence; (5) review of settlement documents; (6) requirement for a unanimous decision to issue an award containing expungement relief; (7) contents of an expungement award; (8) grounds for awarding expungement; (9) evidentiary weight of a decision by customers or authorized representatives not to attend or participate; and, (10) forum fees.⁴⁶³ In addition, the proposed rule change would expand the authority of the Director to deny the use of the DRS arbitration forum.⁴⁶⁴

1. Hearing Format

Current FINRA rules require a panel that is deciding an expungement request to hold a recorded hearing session (by telephone or in person) regarding the appropriateness of

⁴⁶³ See Section II.D., “Procedural Requirements Relating to All Expungement Hearings.”

⁴⁶⁴ See Section II.C.3, “Director’s Authority to Deny the Forum.”

expungement.⁴⁶⁵ The proposed rule change would also permit the panel to hold a recorded hearing session by video conference. The proposed rule change would also clarify that a panel would not be limited in the number of hearing sessions it could hold to decide an expungement request.⁴⁶⁶ No commenter supported or objected to these proposed changes.

This is an appropriate approach. Permitting parties to hold a recorded hearing session by video conference enhances party participation by making it more convenient and allowing others to read facial expressions of those testifying. In addition, by not limiting the number of hearing sessions a panel could schedule to hear an expungement request, the proposed rule change would help ensure that parties would not be limited in presenting their arguments.⁴⁶⁷

2. Appearance by Associated Person or Party Requesting Expungement

The proposed rule change would require the associated person whose information in the CRD system is the subject of the expungement request to appear in person or by video conference at the expungement hearing.⁴⁶⁸ Likewise, a party requesting expungement on behalf of an unnamed person or the party's representative would also be required to appear in person or by video conference at the hearing.⁴⁶⁹ The panel would determine the method of appearance.⁴⁷⁰ FINRA stated that it believes the associated person should be required to appear in person or by video conference at the expungement hearing and be available to respond to questions.

⁴⁶⁵ See FINRA Rules 12805(a) and 13805(a).

⁴⁶⁶ See proposed Rules 12805(c)(1) and 13805(c)(1).

⁴⁶⁷ Arbitrators would remain in control of the number of hearings needed to decide an expungement request. See FINRA Rule 12500 (Initial Prehearing Conference) (requiring the Director to schedule an Initial Prehearing Conference during which the panel will, among other things, schedule any subsequent hearing sessions during which a request would be heard).

⁴⁶⁸ See proposed Rules 12805(c)(2) and 13805(c)(2).

⁴⁶⁹ See id.; see also FINRA April 3 Letter at 7.

⁴⁷⁰ See id.

Requiring the associated person's appearance to be in person or by video conference would help the panel assess the associated person's credibility, which may be particularly important if the request is unopposed.⁴⁷¹

No commenter supported or objected to these proposed changes. One commenter stated that "FINRA should be mindful that not all persons have the same kind of access to technology and bandwidth. As such, the panel should also have discretion to decide the appropriateness of the manner and form of the requesting... [associated person's] participation given the circumstances."⁴⁷² FINRA responded that the proposed rule change provides the panel with that discretion. However, FINRA stated that the method of appearance would be required to be in person or by video conference because FINRA believes the panel may be better able to assess the associated person's credibility through these methods of appearance.⁴⁷³

Given the importance of protecting the integrity of the information in the CRD system, FINRA reasonably determined to require that a party requesting expungement appear at the expungement hearing either in person or by video conference. Such a requirement will allow the panel to better assess the testimony of such persons, but also provides flexibility to accommodate instances in which it may not be reasonable or necessary to require an in-person hearing. Leaving the manner of appearance within the panel's discretion is appropriate, as the panel will be free to require an in-person appearance where, from the panel's perspective, the record requires or will be improved by such an appearance.

⁴⁷¹ See Notice at 50182.

⁴⁷² Del Toro.

⁴⁷³ See FINRA April 3 Letter at 7.

3. Customer's Attendance and Participation During the Expungement Hearing

The proposed rule change would codify certain provisions of the Guidance to: (1) allow the customer and their representative to appear at the expungement hearing;⁴⁷⁴ (2) allow the customer to testify (telephonically, in person, or by other method) at the expungement hearing;⁴⁷⁵ (3) allow the representative for the customer or a pro se customer to introduce documents and evidence at the expungement hearing;⁴⁷⁶ (4) allow the representative for the customer or a pro se customer to cross-examine the associated person or other witnesses called by the party seeking expungement;⁴⁷⁷ and (5) allow the representative for the customer or a pro se customer to present opening and closing arguments if the panel allows any party to present such arguments.⁴⁷⁸

FINRA stated that it believes that customer participation during an expungement hearing provides the panel with important information and perspective that it might not otherwise receive. Through the proposed rule change, FINRA seeks to make it easier for customers to participate and, thereby, to encourage them to do so.⁴⁷⁹ FINRA further stated that the proposed rule change strikes the right balance between allowing the customer to participate fully in the hearing and, on the other hand, giving the requesting party the opportunity to substantiate arguments in support of the expungement request.⁴⁸⁰ This opportunity includes the ability of the requesting party to cross-examine a customer who chooses to testify and to object to evidence introduced by a customer.⁴⁸¹

⁴⁷⁴ See proposed Rules 12805(c)(3)-(4) and 13805(c)(3)-(4).

⁴⁷⁵ See proposed Rules 12805(c)(3)(B) and 13805(c)(3)(B).

⁴⁷⁶ See proposed Rules 12805(c)(5)(A) and 13805(c)(5)(A).

⁴⁷⁷ See proposed Rules 12805(c)(5)(C) and 13805(c)(5)(C).

⁴⁷⁸ See proposed Rules 12805(c)(5)(D) and 13805(c)(5)(D).

⁴⁷⁹ See Notice at 50183.

⁴⁸⁰ See *id.*

⁴⁸¹ See *id.*

Commenters both supporting and opposing the proposed rule change recommended modifications to these provisions.⁴⁸² One commenter who opposed the proposed rule change objected to the participation of non-parties (such as customers in a straight-in proceeding) without such parties submitting to FINRA jurisdiction because non-parties who commit perjury cannot be sanctioned or reprimanded.⁴⁸³ Another commenter supported the proposed rule change but recommended that the proposed rule change be amended to make clear that customers would have the opportunity and ability to participate “in all aspects” of the hearing, such that customers could attend the entire hearing, introduce arguments, and make their points at any time they deem appropriate.⁴⁸⁴

In response to the first commenter, FINRA stated that arbitrators on the Special Arbitrator Roster would have the experience necessary to assess the credibility of those attending and participating in the hearing, as well as any documentary information. In addition, FINRA pointed out that the proposed rule change would give an associated person requesting expungement the opportunity to cross-examine a non-party customer if the person chooses to testify or any witness called by the customer or authorized representative.⁴⁸⁵ FINRA believes these mechanisms should be sufficient to ensure that a non-party’s testimony or documentary information presented is appropriately scrutinized.⁴⁸⁶

⁴⁸² See AdvisorLaw at 3; NASAA September 6 Letter at 4.

⁴⁸³ See AdvisorLaw at 3. The Commission notes that, with respect to customer participation for purposes of FINRA Rules 13512 (Subpoenas), 13513 (Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas), 13602 (Attendance at Hearings), and 13903 (Hearing Session Fees, and Other Costs and Expenses), the customer would be a non-party only to the extent that an expungement request was made as a straight-in request under the Industry Code.

⁴⁸⁴ See NASAA September 6 Letter at 4.

⁴⁸⁵ See FINRA November 10 Letter at 9.

⁴⁸⁶ See *id.* at 10.

FINRA responded to the other comment by making one of the proposed modifications in Amendment No. 1 to provide that customers would have the opportunity and ability to participate in all aspects of the hearing.⁴⁸⁷ Three commenters supported this amendment, stating that the amendment would enable arbitration panels to have a more detailed and balanced view of the relevant facts and events underlying the expungement request.⁴⁸⁸ Another commenter recommended limiting a customer's ability to participate in a hearing, stating that while allowing customer participation "can provide value," for logistics reasons, the customer should not be able to request discovery.⁴⁸⁹

In response, FINRA stated that customer attendance and participation in expungement hearings helps the panel fully develop a record on which to decide the expungement request.⁴⁹⁰ FINRA further responded that as a non-party to the straight-in request, the customer would not be permitted under the proposed rule change to seek discovery from the parties through the DRS arbitration forum, so the proposed rule change is consistent with the commenter's view in this regard.⁴⁹¹

Customer participation during an expungement hearing should provide a panel with important information and perspective that it might not otherwise receive. The Commission also understands that customers may have little personal interest in participating in a hearing once their claim has been resolved. The proposed rule changes would implement enhancements to facilitate customer participation in those cases where customers wish to participate. The Commission further believes that the procedural safeguards will appropriately balance the ability

⁴⁸⁷ See Amendment No. 1; see also supra note 11.

⁴⁸⁸ See PIABA Foundation December 7 Letter at 2; PIABA December 7 Letter at 2; NASAA December 7 Letter at 2.

⁴⁸⁹ See Grebenik.

⁴⁹⁰ See FINRA April 3 Letter at 12.

⁴⁹¹ See id. 11-12; see also Notice at 50186 n.182.

of a customer to participate in a hearing and provide relevant information with the interest of an associated person in testing any such information through objection or cross-examination. This ability to object or cross-examine should also help address concerns that non-parties are not themselves subject to FINRA's jurisdiction.

4. Panel Requests for Additional Documents or Evidence

The proposed rule change would codify the ability of the panel to request from the associated person, the party requesting expungement on behalf of an unnamed person, and the member firm at which the person was associated at the time the customer dispute arose, as applicable, any documentary, testimonial, or other evidence that the panel deems relevant to the expungement request.⁴⁹² FINRA stated that in deciding an expungement request, particularly in cases that settle before an evidentiary hearing or in cases where the customer does not attend or participate in the expungement hearing, the panel's role as fact finder is critical.⁴⁹³ FINRA further stated that, given this significant role, the panel must ensure that it has all of the information necessary to make a fully informed decision on the expungement request on the basis of a complete factual record.⁴⁹⁴

One commenter expressed support for the proposed rule change and suggested that FINRA amend the proposed rule change to consider the failure to produce requested documents to be grounds for denial of the expungement request with prejudice.⁴⁹⁵ FINRA declined to amend the proposed rule change in response to this comment.⁴⁹⁶ FINRA stated that its rules already provide arbitrators with authority to determine whether sanctions should be imposed for

⁴⁹² See proposed Rules 12805(c)(6) and 13805(c)(7).

⁴⁹³ See Notice at 50183.

⁴⁹⁴ See id.

⁴⁹⁵ See NASAA September 6 Letter at 5.

⁴⁹⁶ See FINRA November 10 Letter at 30-31.

failure to comply with any provision of the Code, or any order of a panel or single arbitrator authorized to act on behalf of the panel.⁴⁹⁷ FINRA specifically pointed out that: (1) a panel may assess monetary penalties payable to one or more parties; preclude a party from presenting evidence; make an adverse inference against a party; assess postponement and forum fees; and assess attorneys' fees, costs and expenses;⁴⁹⁸ (2) a panel may dismiss a claim, defense, or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective;⁴⁹⁹ (3) a member or an associated person could be subject to disciplinary action for failure to produce requested documents;⁵⁰⁰ and (4) such failure may be deemed conduct inconsistent with just and equitable principles of trade and a violation of FINRA Rule 2010.⁵⁰¹

The proposed rule change should help ensure that a panel receives the documents or information that it requests, and further that a panel is already empowered to dismiss a claim with prejudice for failure to comply with an order of the panel. Further, the arbitrator's critical role as fact-finder in deciding expungement requests requires that arbitrators have the ability to request evidence relevant to their decisions. By providing arbitrators with this power, the proposed rule change will help panels establish more fully developed records upon which to base awards.

5. Review of Settlement Documents

The proposed rule change would retain current FINRA Rules 12805(b)'s and 13805(b)'s requirement for a panel considering an expungement request to review any related settlement

⁴⁹⁷ See id.

⁴⁹⁸ See id. at 30 (citing FINRA Rules 12212(a) and 13212(a)).

⁴⁹⁹ See id. at 30-31 (citing FINRA IM-12000(c), FINRA Rule 12212(c), FINRA IM-13000(c), and FINRA Rule 13212(c)).

⁵⁰⁰ See id. at 31 (citing FINRA Rules 12212(b) and 13212(b)).

⁵⁰¹ See id. (citing FINRA IM-12000(c) and FINRA IM-13000(c)).

documents and consider the amount of payments made to any party, and any other terms and conditions of the settlement.⁵⁰² In addition, in cases in which a customer does not participate in the expungement hearing, or a requesting party states that a customer has indicated that they will not oppose the expungement request, the proposed rule change would codify the suggestion, currently in the Guidance, that the panel should inquire and fully consider whether a party impermissibly conditioned a settlement of the arbitration upon the customer's agreement not to oppose the request for expungement.⁵⁰³ No commenter supported or objected to these proposed changes. The proposed rule change should provide arbitrator oversight of past settlement agreements which should help ensure (through deterrence) that future settlements are not impermissibly conditioned on a customer's agreement not to oppose the request for expungement.

6. Unanimous Decision to Issue an Award Containing Expungement Relief

Under current FINRA rules, consistent with arbitration cases generally, a panel may award expungement based on a majority decision of the arbitrators.⁵⁰⁴ The proposed rule change would require that the arbitrators agree unanimously to issue an award containing expungement relief.⁵⁰⁵ FINRA stated that, although the vast majority of expungement decisions are already unanimous,⁵⁰⁶ this change would help protect the integrity of the information in the CRD system and help ensure that the expungement process operates as intended—as a remedy that is

⁵⁰² See proposed Rules 12805(c)(7) and 13805(c)(8); see also Notice at 50183-84.

⁵⁰³ See id.

⁵⁰⁴ See FINRA Rules 12410 and 13414.

⁵⁰⁵ See proposed Rules 12805(c)(8)(A) and 13805(c)(9)(A).

⁵⁰⁶ In the Notice, FINRA stated that during the sample period of January 2016 to December 2021, in arbitrations decided by a three-person arbitration panel and involving an expungement request, the panel decision was unanimous in 98 percent and not unanimous in 2 percent of arbitrations. See Notice at 50184 n.157; see also id. at 50173 n.28 (defining the length of the sample period).

appropriate only in limited circumstances in accordance with the narrow standards in FINRA rules.⁵⁰⁷

Five commenters supported the proposed unanimity requirement.⁵⁰⁸ Two of these commenters reasoned that the unanimity requirement would further safeguard the integrity of the information in the CRD system.⁵⁰⁹ Three commenters also supported the unanimity requirement as ensuring that expungement is an “extraordinary”⁵¹⁰ or “exceptional”⁵¹¹ remedy.

Six commenters, on the other hand, opposed the unanimity requirement.⁵¹² One of these commenters argued that the requirement of the written rationale would encourage unanimity of the decision without mandating it and would further ensure the remedy is extraordinary, thus maintaining the necessary balance between investor protection and regulatory value with fairness to advisors.⁵¹³ Two of these commenters argued that no single arbitrator should hold veto power over an expungement decision because it would lead to more inaccurate and misleading data in

⁵⁰⁷ See id. at 50184.

⁵⁰⁸ See Cornell at 4; NASAA September 6 Letter at 3; Edwards at 1; St. John’s at 3; PIABA September 6 Letter at 2.

⁵⁰⁹ See Cornell at 4 and St. John’s at 3.

⁵¹⁰ See St. John’s at 3; PIABA September 6 Letter at 2.

⁵¹¹ See Cornell at 4.

⁵¹² See letter from Victoria Staudinger, to the Commission, dated August 16, 2022; SIFMA September 2 Letter at 7; FSI at 5; Grebenik; Beckner; Del Toro.

⁵¹³ See FSI at 5.

the CRD system,⁵¹⁴ while a fourth argued that requiring unanimous agreement does not value the opinions of all arbitrators.⁵¹⁵

FINRA declined to amend the proposed rule change and responded that requiring a unanimous decision of the arbitrators would help protect the integrity of the information in the CRD system and help ensure that the expungement process operates as intended.⁵¹⁶

Requiring a unanimous decision will help enhance the integrity of the information in the CRD system by helping ensure expungement will only be awarded when there is no disagreement among the arbitrators that the factual record supports it. The importance of the CRD system extends to all aspects of regulation of broker-dealers and registered representatives. Among other things, the information about firms and registered representatives available on CRD facilitates regulators, such as FINRA and the other SROs, state regulators, as well as the Commission, in meeting their regulatory obligations. In addition, certain information in the CRD system is available to the public through BrokerCheck; this information helps investors make better-informed choices about the registered representatives and broker-dealer firms with whom they may conduct business. For these reasons, the importance of the integrity of information in the CRD system militates against awarding expungement in circumstances where there may be disagreement about the merits of a claim.

One commenter recommended that the panel's unanimous decisions to expunge records should only be reached when the evidence presented in support of expungement meets a clear

⁵¹⁴ See SIFMA September 2 Letter at 7; see also Del Toro.

⁵¹⁵ See Grebenik.

⁵¹⁶ See FINRA November 10 Letter at 11; see also FINRA April 3 Letter at 4-5.

and convincing standard of proof.⁵¹⁷ This commenter reasoned that such an evidentiary standard would be consistent with the extraordinary nature of expungement.⁵¹⁸

FINRA declined to amend the proposed rule change in response to this recommendation. FINRA stated that to further clarify the limited circumstances under which arbitrators must decide expungement requests, the proposed rule change would expressly list in the Codes the narrow grounds in FINRA Rule 2080(b)(1) for deciding these requests.⁵¹⁹ FINRA stated that it believes that the explicit incorporation of these grounds into the Codes and the requirement for a unanimous decision by arbitrators from the Special Arbitrator Roster would achieve the goal of balancing the competing interests in the expungement process of providing a fair process and protecting the integrity of the information in the CRD system.⁵²⁰ Finally, FINRA stated it will continue to evaluate whether there are other ways to further strengthen the expungement process, including whether to require that a panel find that the evidence presented in support of an expungement request meets a clear and convincing standard of proof in order to issue an award containing expungement relief.⁵²¹

The importance of the integrity of information in the CRD system militates against awarding expungement in circumstances where there may be disagreement about the merits of a claim. Thus, as stated above, requiring a unanimous decision will enhance the integrity of the information in the CRD system by helping ensure expungement will only be awarded when there is no disagreement among the arbitrators that the factual record supports it. Furthermore, by requiring a three-person panel of specially trained, specially qualified arbitrators to unanimously

⁵¹⁷ See NASAA September 6 Letter at 3.

⁵¹⁸ See id.

⁵¹⁹ See FINRA November 10 Letter at 17; see also proposed Rules 12805(c)(8)(A)(i) and 13805(c)(9)(A)(i).

⁵²⁰ See FINRA November 10 Letter at 17.

⁵²¹ See FINRA April 3 Letter at 18-19.

decide an expungement request based on three specified grounds⁵²² (in addition to the proposed reforms to the process for selecting arbitrators and the enhanced training and qualification), the proposed rule change is reasonably designed to help ensure that arbitrators only award expungement when there is evidentiary support of their decisions. Therefore, FINRA’s decision regarding the evidentiary standard is reasonable in light of the implementation of a unanimous decision requirement, and other proposed safeguards.

7. Awards

Current FINRA Rules 12805(c) and 13805(c) require that the panel provide a “brief” written explanation of the reasons for its finding that one or more of the grounds for expungement applies to the facts of the case. The proposed rule change would retain the requirements of current Rules 12805(c) and 13805(c) but would remove the word “brief.” As a result, the panel would be required to provide enough detail in the award to explain its rationale for awarding expungement relief.⁵²³ In addition, the proposed rule change would incorporate language from the Guidance by requiring that the panel’s explanation identify any specific documentary, testimonial or other evidence on which the panel relied in awarding expungement relief.⁵²⁴

One commenter suggested that FINRA “strengthen” this aspect of the proposed rule change by requiring arbitrators to provide a thorough explanation of how a request meets expungement’s extraordinary standard, including an explanation of how the arbitrators determined that the requesting party’s uncontested assertions accurately reflected the truth of the matter.⁵²⁵

⁵²² See Section III.D.8., “Grounds for Recommending Expungement.”

⁵²³ See proposed Rules 12805(c)(8)(B) and 13805(c)(9)(B); see also Notice at 50184.

⁵²⁴ See proposed Rules 12805(c)(8)(B) and 13805(c)(9)(B).

⁵²⁵ See NASAA September 6 Letter at 5.

FINRA declined to amend the proposed rule change and responded that the panel's explanation would be required to not be solely a recitation of one of the grounds for awarding expungement relief or language provided in the expungement request and that the proposed rule change would require the panel to identify any specific documentary, testimonial, or other evidence on which the panel relied in awarding expungement relief.⁵²⁶ In addition, FINRA stated that it would specify in its enhanced expungement training for arbitrators the importance of explaining their rationale for awarding expungement relief.⁵²⁷

Requiring a written rationale that specifically identifies the basis for an expungement award and the documents or other evidence that supports such an award should be sufficient both to help ensure that a panel has considered the available evidence and its bearing on the available bases for an expungement award and should help ensure that a panel has correctly identified a permissible ground for expungement. Further, the written rationale requirement should provide interested parties with enough information to understand the reasons for an expungement award.

8. Grounds for Recommending Expungement

As stated above, both currently and under the proposed rule change, an associated person may seek expungement of customer dispute information by obtaining a court expungement order by either: (1) going through the arbitration process and obtaining an award recommending expungement (and then obtaining a court order confirming the arbitration award); or (2) going directly to court (without first going through arbitration). Regardless of whether expungement of customer dispute information is sought directly through a court or by first going through arbitration, FINRA Rule 2080 requires an associated person seeking expungement to obtain a court order directing such expungement or confirming an award containing such

⁵²⁶ See FINRA November 10 Letter at 18.

⁵²⁷ See *id.*

expungement.⁵²⁸ Moreover, under FINRA Rule 2080(b) members or associated persons petitioning a court for expungement relief, or seeking judicial confirmation of an arbitration award containing expungement relief, must name FINRA as an additional party and serve FINRA with all appropriate documents unless this requirement is waived by FINRA pursuant to either Rule 2080(b)(1) or 2080(b)(2). Specifically, FINRA Rule 2080(b)(1) provides that FINRA may waive the requirement to name FINRA as a party in situations where “expungement relief is based on affirmative judicial or arbitral findings” of factual impossibility, mistake, or falsity.⁵²⁹

In addition to FINRA’s ability to waive the obligation to name FINRA as a party under FINRA Rule 2080(b)(1), FINRA may also waive the requirement to name FINRA as a party to a court proceeding seeking confirmation of an arbitration award pursuant to FINRA Rule 2080(b)(2).⁵³⁰ FINRA Rule 2080(b)(2) provides that FINRA may waive this requirement in situations in which “the expungement relief is based on judicial or arbitral findings other than those described above”—that is, situations in which an arbitrator has not found factual impossibility, mistake, or falsity but, nevertheless, has recommended expungement based on findings not named in Rule 2080. In such situations, “FINRA, in its sole discretion and under extraordinary circumstances, also may waive the obligation to name FINRA as a party if [FINRA] determines that: (A) the expungement relief and accompanying findings on which it is based are meritorious; and (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements.”⁵³¹ In other

⁵²⁸ See supra notes 25-30 and accompanying text.

⁵²⁹ See FINRA Rule 2080(b)(1). FINRA Rule 2080 is not part of the Codes. FINRA stated that it is not proposing amendments to FINRA Rule 2080 at this time but is considering whether enhancements to the current expungement process through changes to FINRA Rule 2080 may be warranted. See Notice at 50184 n.162.

⁵³⁰ See supra note 29 and accompanying text.

⁵³¹ See FINRA Rule 2080(b)(2).

words, if an arbitrator recommends expungement on grounds other than factual impossibility, mistake, or falsity, FINRA may, in “extraordinary circumstances” nevertheless decide to waive the obligation to name FINRA as a party if FINRA finds: (1) that the alternative grounds supplied by the arbitrator and the arbitrator’s recommendation are meritorious and (2) that the expungement would have no material adverse effect on investor protection, the integrity of the information in the CRD system, or regulatory requirements.⁵³²

It is FINRA’s view that, currently, in order to issue an award containing expungement relief, a panel must affirmatively find that one of the three grounds contained in FINRA Rule 2080(b)(1) has been met.⁵³³ More specifically, current FINRA Rules 12805 and 13805 require that, in order to issue an award containing expungement of customer dispute information, a panel must indicate in the arbitration award which of the FINRA Rule 2080 grounds for expungement serves as the basis for its expungement order. In other words, according to FINRA, to include expungement relief in an award, FINRA Rules 12805 and 13805 currently require a panel to find that: (1) the claim, allegation, or information is factually impossible or clearly erroneous; (2) the associated person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (3) the claim, allegation, or information is false.⁵³⁴

The proposed rule change would replace FINRA Rules 12805’s and 13805’s reference to FINRA Rule 2080 with an enumeration of the specific grounds identified in FINRA Rule 2080(b)(1) (i.e., factual impossibility, mistake, or falsity). FINRA stated that the proposed rule change thus would codify, in the Codes, the grounds identified in FINRA Rule 2080(b)(1) as the

⁵³² See Notice at 50184 n.162; see also FINRA November 10 Letter at 12 n.54.

⁵³³ See Notice at 50173.

⁵³⁴ See id. at 50173 n.31 and accompanying text; see also id. at 50184 n.162.

exclusive grounds upon which an arbitration panel may issue an award containing expungement of customer dispute information from the CRD system.⁵³⁵

In FINRA's view, both FINRA and the Commission historically have treated the grounds in Rule 2080(b)(1) as the exclusive grounds upon which expungement may be awarded.⁵³⁶ Consistent with this view, the proposed rule change, in addition to codifying the FINRA Rule 2080(b)(1) grounds as the exclusive grounds upon which a panel may base an expungement award, would also state that a panel shall not issue, and the Director shall not serve, an award containing expungement relief based on grounds other than those in proposed Rules 12805(c)(8)(A)(i) and 13805(c)(9)(A)(i).⁵³⁷ Three commenters supported these proposed changes to FINRA Rules 12805 and 13805.⁵³⁸ Two of these commenters stated that the required grounds for issuing an expungement award would help ensure that expungement is an extraordinary remedy.⁵³⁹ The third commenter reasoned that the proposed rule change should drive outcomes that are more consistent with the limited circumstances under which expungement can be granted and favors consistency in the expungement process.⁵⁴⁰

One commenter objected to this provision of the proposed rule change, positing that FINRA should not limit the grounds for when arbitrators can recommend expungement to those

⁵³⁵ See id. at 50184 n.162 and accompanying text.

⁵³⁶ See id. at 50173 n.31 (citing, among other things, Exchange Act Release No. 58886 (Oct. 30, 2008), 73 FR 66086, 66087 (Nov. 6, 2008) (Order Approving File No. SR-FINRA-2008-010) (stating that new Rules 12805 and 13805 require the arbitration panel to indicate "which of the grounds for expungement in Rule [2080](b)(1)(A)-(C) serves as the basis for the expungement") and Regulatory Notice 08-79 (December 2008) (stating that "[t]he arbitration panel must indicate which of the grounds for expungement under Rule [2080](b)(1)(A)-(C) serve as the basis for their expungement order")). Id. See also FINRA November 10 Letter at 13-14 and 14 n.62; see also FINRA April 3 Letter at 16.

⁵³⁷ See proposed Rules 12805(c)(8)(A)(ii) and 13805(c)(9)(A)(ii).

⁵³⁸ See Cambridge at 2-3; Cornell at 4; St. John's at 3.

⁵³⁹ See Cornell at 4; St. John's at 3.

⁵⁴⁰ See Cambridge at 2.

contained in current Rule 2080(b)(1), incorporated into proposed Rule 12805 and 13805, but should also allow arbitrators to recommend expungement on the grounds contained in Rule 2080(b)(2) by also incorporating those grounds into the proposed rule change.⁵⁴¹ The commenter stated that the current grounds for granting expungement under FINRA rules are not limited to the three grounds listed in Rule 2080(b)(1) (i.e., factual impossibility, mistake, or falsity), but also include the grounds listed in Rule 2080(b)(2) (i.e., (1) the expungement and accompanying findings on which it is based are meritorious and (2) expungement would have no material adverse effect on investor protection, the integrity of the information in the CRD system, or regulatory requirements).⁵⁴² Accordingly, and notwithstanding prior FINRA guidance purporting to limit the grounds upon which a panel may grant expungement to those contained Rule 2080(b)(1), in the commenter's view arbitrators may also award expungement based on Rule 2080(b)(2).⁵⁴³ The commenter disagreed with FINRA's position that subsection (b)(2) only provides factors for FINRA to consider in deciding whether to waive the obligation to name FINRA as a party in a court petition for expungement relief. Instead, the commenter stated that Rules 2080(b)(1) and 2080(b)(2) operate in the same manner and that Rule 2080(b)(2) provides additional grounds on which a panel may base an expungement award.⁵⁴⁴ In support of its recommendation, the commenter argued that failing to permit expungement on the grounds

⁵⁴¹ See SIFMA September 2 Letter at 4-6; see also letter from Kevin M. Carroll, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to the Commission, dated December 7, 2022 ("SIFMA December 7 Letter") (expanding on its argument that the proposed rule change should permit arbitrators to recommend expungement if they find the grounds contained in Rule 2080(b)(2), in addition to Rule 2080(b)(1), in response to FINRA November 10 Letter); Del Toro (arguing that "[e]xpungement awards based solely on Rule 2080(b)(2) are rare, but they are nevertheless allowed under the current rules").

⁵⁴² See SIFMA September 2 Letter at 3-4 (quoting FINRA Rules 12805 and 13805); SIFMA December 7 Letter at 2.

⁵⁴³ See SIFMA September 2 Letter at 2-4; SIFMA December 7 Letter at 2.

⁵⁴⁴ See SIFMA September 2 Letter at 4; SIFMA December 7 Letter at 2.

contained in Rule 2080(b)(2) would result in meritorious expungement requests being rejected, leading to inaccurate and misleading information remaining in the CRD system.⁵⁴⁵ The commenter further stated that FINRA has not justified limiting the grounds upon which expungement may be awarded to those contained in the proposed rule change (i.e., the grounds in Rule 2080(b)(1)).⁵⁴⁶ The commenter added that the proposed rule change is inconsistent with the Exchange Act because FINRA: (1) circumvented the proper rulemaking process by failing to provide adequate notice that it was proposing a significant rule change to limit the expungement grounds to Rule 2080(b)(1) or an opportunity for comment;⁵⁴⁷ and (2) failed to provide any cost-benefit analysis, or other justification, to support limiting the grounds for expungement to those under Rule 2080(b)(1).⁵⁴⁸

FINRA disagreed with the commenter, stating that Rules 12805 and 13805 and their rulemaking history and related guidance establish that arbitrators in the forum are currently limited to the grounds enumerated in FINRA Rule 2080(b)(1)(A)-(C) when awarding expungement.⁵⁴⁹ According to FINRA, the plain language of current FINRA Rules 12805 and 13805 is consistent with FINRA's position that, currently, FINRA Rule 2080(b)(1) lists the exclusive grounds upon which a panel may award expungement.⁵⁵⁰ Specifically, FINRA stated

⁵⁴⁵ See SIFMA September 2 Letter at 5-6; SIFMA December 7 Letter at 3.

⁵⁴⁶ See SIFMA September 2 Letter at 4-6; SIFMA December 7 Letter at 3; Del Toro (stating that "FINRA Rule 2080 is a substantive rule and its modification requires a comprehensive rulemaking process through which FINRA must provide justification for making said change. FINRA has provided no such justification here," and "[FINRA] provides no evidence or data suggesting that arbitrators are applying an incorrect standard in arbitration cases").

⁵⁴⁷ See SIFMA December 7 Letter at 2; see also SIFMA September 2 Letter at 4, 10; Del Toro (stating that "some of the Proposal[']s changes result in the indirect abrogation of FINRA Rule 2080(b)(2) through a procedural rule change").

⁵⁴⁸ See SIFMA December 7 Letter at 3.

⁵⁴⁹ See FINRA November 10 Letter at 12-15; see also FINRA April 3 Letter at 15-16.

⁵⁵⁰ See FINRA November 10 Letter at 14.

that current FINRA Rules 12805 and 13805 describe what “the panel must” do in order to grant expungement of customer dispute information, and only FINRA Rule 2080(b)(1) describes grounds upon which arbitrators may grant expungement in the forum.⁵⁵¹ By contrast, Rule 2080(b)(2) provides a general standard for FINRA to consider in making its own regulatory determination in extraordinary circumstances when the court or arbitrator makes findings “other than those described in [2080](b)(1)].”⁵⁵² According to FINRA, as a result, the language in current FINRA Rules 12805 and 13805 requiring the panel to “[i]ndicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order” is properly understood as referring only to the grounds listed in paragraph (b)(1), as those are the only specific grounds listed in FINRA Rule 2080 that a panel could affirmatively find in making an expungement determination.⁵⁵³

FINRA further stated that by approving FINRA Rule 2080 and FINRA Rules 12805 and 13805, the Commission demonstrated its expectation that a panel should indicate in the arbitration award which of the grounds for expungement in Rule 2080(b)(1)(A)-(C) serves as the basis for the expungement order.⁵⁵⁴ According to FINRA, the Commission thus “explicitly approved the FINRA Rule 2080(b)(1) limitation.”⁵⁵⁵

FINRA also disagreed with the commenter that not permitting expungement on Rule 2080(b)(2) grounds would lead to inaccurate and misleading information in the CRD system.⁵⁵⁶

⁵⁵¹ See id. at 14-15.

⁵⁵² See id. at 14.

⁵⁵³ See id. at 15.

⁵⁵⁴ Id. at 13-14 (citing Exchange Act Release No. 58886 (October 30, 2008), 73 FR 66086, 66087 (November 6, 2008) (Order Approving File No. SR-FINRA-2008-010)).

⁵⁵⁵ Id. at 14 (citing Exchange Act Release No. 58886 (October 30, 2008), 73 FR 66086, 66087 (November 6, 2008) (Order Approving File No. SR-FINRA-2008-010)).

⁵⁵⁶ See id. at 12-13.

On the contrary, FINRA stated that it believes that allowing arbitrators in the forum to issue awards containing expungement relief by applying an “equitable” standard would not sufficiently protect the integrity of the information in the CRD system, as, in FINRA’s view, any removal of information from the CRD system should be based on specific, enumerated standards, such as those provided in FINRA Rule 2080(b)(1).⁵⁵⁷ If FINRA were to change course and expand the grounds for expungement to allow for (b)(2) grounds, as advocated by the commenter, FINRA believes it would inappropriately broaden the grounds for expungement to allow for removal of dispute information beyond the extraordinary circumstances in which expungement is appropriate.⁵⁵⁸ In particular, whereas (b)(1) identifies specific grounds for expungement, the (b)(2) grounds are entirely open ended, as they refer only to grounds “other than those described” in (b)(1).⁵⁵⁹

In response to the commenter’s assertion that FINRA has not justified the proposed rule changes, FINRA reiterated its view, stated in the Notice, that the proposed rule changes would further protect the integrity of the information in the CRD system.⁵⁶⁰ FINRA stated the proposed rule changes would reinforce that expungement is appropriate only in extraordinary circumstances by specifying in the Codes the narrow grounds that arbitrators must find in issuing an award containing expungement relief.⁵⁶¹ FINRA stated that amending Rules 12805 and 13805 to codify the three narrow grounds in Rule 2080(b)(1) as the only grounds on which arbitrators may determine to award expungement relief best aligns with FINRA’s position that its expungement framework should allow for the removal of customer dispute information from the

⁵⁵⁷ See id.

⁵⁵⁸ See FINRA November 10 Letter at 12-17; see also FINRA April 3 Letter at 16-17.

⁵⁵⁹ See FINRA November 10 Letter at 12-17; see also FINRA April 3 Letter at 16-17.

⁵⁶⁰ See FINRA November 10 Letter at 12, 16; see also FINRA April 3 Letter at 17; see also Notice at 50186.

⁵⁶¹ See FINRA November 10 Letter at 12, 16; see also FINRA April 3 Letter at 16.

CRD system only in extraordinary circumstances in accordance with FINRA's rules.⁵⁶² These three narrow grounds, in FINRA's view, fairly address the circumstances in which an associated person would appropriately seek expungement of customer dispute information in the DRS arbitration forum.⁵⁶³ In addition, FINRA stated that allowing expungement only in these extraordinary circumstances would continue to balance the competing interests of providing regulators with broad access to information about customer disputes to fulfill their regulatory obligations, providing a fair process that recognizes an associated person's interest in protecting their reputation, and ensuring investors have access to accurate information about associated persons with whom they may decide to do business.⁵⁶⁴ Furthermore, FINRA stated that it has undertaken an economic impact assessment to analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet FINRA's regulatory objectives.⁵⁶⁵

Finally, FINRA also disagreed with the commenter's assertion that FINRA has not provided adequate notice or opportunity for public comment of its intent to amend FINRA Rules 12805 and 13805 to codify the exclusive grounds upon which an arbitration panel may issue an award containing expungement of customer dispute information from the CRD system.⁵⁶⁶ FINRA stated that by proposing the proposed rules it has solicited comment on the proposed rule change, which FINRA stated clearly articulates the amendment and the basis for it.⁵⁶⁷ In

⁵⁶² See FINRA April 3 Letter at 16.

⁵⁶³ See id. at 16-17.

⁵⁶⁴ See id. at 17.

⁵⁶⁵ See id. (citing Notice at 50189-50198).

⁵⁶⁶ See FINRA November 10 Letter at 16; see also FINRA April 3 Letter at 17.

⁵⁶⁷ See FINRA November 10 Letter at 16; see also FINRA April 3 Letter at 17.

addition, FINRA stated that it had also previously solicited comment in Regulatory Notice 17-42.⁵⁶⁸ According to FINRA, adequate notice and opportunity for comment in this instance is demonstrated by publication of the proposed rules explaining the reasons for the proposed rule change, the commenter's comment letters in response to the proposed rules, and FINRA's consideration of and responses to comments.⁵⁶⁹

The Commission's order approving Rules 12805 and 13805 stated that "in order to grant expungement of customer dispute information under Rule [2080], the panel must . . . indicate in the arbitration award which of the grounds for expungement in Rule [2080](b)(1)(A)-(C) serves as the basis for the expungement order."⁵⁷⁰ The proposed rule change would codify FINRA's intended exclusive grounds for expungement. Codifying in FINRA Rules 12805 and 13805 the grounds enumerated in Rule 2080(b)(1) as the only grounds on which an arbitrator may recommend expungement would give arbitrators a clear mandate. It would resolve any potential uncertainty regarding the applicability of FINRA Rule 2080(b)(2) as an appropriate ground upon which arbitrators may issue awards containing expungement relief. Moreover, consistent with FINRA guidance, it would help ensure that arbitrators recommend expungement only as an extraordinary remedy in the extraordinary circumstances of factual impossibility, mistake, or falsity.

The proposed rule change would also help protect the integrity of information in the CRD system by helping ensure that expungement remains an extraordinary remedy limited to narrow, enumerated circumstances. The Commission also believes that FINRA's decision to limit the grounds for expungement to those enumerated in Rule 2080(b)(1) is appropriate. Because Rule

⁵⁶⁸ See FINRA November 10 Letter at 16.

⁵⁶⁹ See FINRA April 3 Letter at 17.

⁵⁷⁰ Id. The Commission's approval order also similarly describes FINRA's response to comments as stating "that the proposal requires arbitrators to evaluate fully whether the party requesting expungement either in arbitration or in connection with a settlement agreement has met the criteria promulgated under Rule [2080](b)(1)(A)-(C)." Id.

2080(b)(2) describes a general standard for FINRA to consider in determining whether or not to waive an associated person's obligation to name FINRA as a party when seeking judicial confirmation of an expungement award, including Rule 2080(b)(2)'s standard would make the type of information that could be expunged broader and less foreseeable and thus risk undermining the integrity of the information in the CRD system.⁵⁷¹

Further, in contrast to the commenter's statement, FINRA provided justification to support limiting the grounds for awarding expungement to those under Rule 2080(b)(1). In its filing, FINRA details the economic impact analyzing "the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet [its] regulatory objectives."⁵⁷² FINRA's analysis covers the potential economic impact of the entire proposed rule change, including proposed Rules 12805(c)(8)(A) and 13805(c)(9)(A).⁵⁷³ Thus, FINRA's economic analysis addressed its codification, in the Codes, of the grounds identified in FINRA Rule 2080(b)(1) as the exclusive grounds upon which an arbitration panel may issue an award containing expungement of customer dispute information from the CRD system.

Furthermore, as stated above, BrokerCheck helps investors make more informed choices about the associated persons and broker-dealer firms with whom they may conduct business.

⁵⁷¹ Although FINRA Rule 2080(b)(2) states that FINRA "in its sole discretion and in extraordinary circumstances" may waive an associated person's obligation to name FINRA as a party when seeking judicial confirmation of an expungement award where FINRA "determines that . . . the expungement relief and accompanying findings on which it is based are meritorious" and "would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements," these "extraordinary circumstances" are not further delineated by the rule and are at FINRA's discretion. By contrast, proposed Rules 12805 and 13805 would specifically identify the extraordinary circumstances in which a panel may award expungement—factual impossibility, mistake, or falsity.

⁵⁷² Notice at 50189-98.

⁵⁷³ See id.

Since the information on BrokerCheck is populated by information from CRD, the integrity of the information investors use to make their investment decisions is dependent on the integrity of the information in the CRD system. An expungement process limited to clear, enumerated standards helps ensure that factually impossible, mistaken, or false information can be removed from the CRD system, while also decreasing the likelihood that arbitrators award expungement on unforeseen or unsound grounds to the detriment of the quality of information in the CRD system. In light of this, the Commission believes that FINRA has appropriately balanced the investor protection benefits of the proposed rule change against the potential harm to associated persons, and that FINRA has reasonably considered the impacts of the proposed rule change as outlined in its economic impact analysis and its response to comments.

Finally, Section 19(b) of the Act,⁵⁷⁴ and Rule 19b-4 thereunder,⁵⁷⁵ set forth the requirements for notice and comment for an SRO proposed rule change. That process was followed for this proposed rule change. The Notice articulated FINRA's proposed rule change, as well as its bases for it. In response, the Commission received forty-five comment letters including from commenters expressing concern about the proposed codification of Rule 2080(b)(1)'s grounds for expungement. On November 10, 2022, FINRA responded to those commenters and filed Amendment No. 1, modifying the original proposed rule change. In the Order Instituting Proceedings, the Commission noticed Amendment No. 1 and requested comment on the proposed rule change, as modified. In response, the Commission received seven comment letters including from commenters expressing concern about the proposed codification of Rule 2080(b)(1)'s grounds for expungement.

⁵⁷⁴ 15 U.S.C. 78s(b)(1).

⁵⁷⁵ 17 CFR 240.19b-4.

9. Evidentiary Weight of Decision of Customer or Authorized Representative Not to Attend or Participate

Originally, the proposed rule change would have included an instruction for arbitration panels that the decision of a customer or an authorized representative of state securities regulators not to attend or participate in the expungement hearing would not be material to the determination of whether expungement is appropriate.⁵⁷⁶ One commenter suggested that FINRA amend the proposed rule change to state clearly that arbitrators must give no weight to such decisions.⁵⁷⁷ FINRA agreed that a customer's or an authorized representative's decision not to attend or participate should not be given any evidentiary weight by the panel when making the expungement determination, and accordingly amended the proposed rule change to clarify this position.⁵⁷⁸

As amended, the proposed rule change states that a panel shall not give any evidentiary weight to a decision by a customer or an authorized representative not to attend or participate in an expungement hearing when making a determination of whether expungement is appropriate.⁵⁷⁹ FINRA stated that it is aware that some panels have indicated in expungement awards that a customer did not appear at the expungement hearing.⁵⁸⁰ But, FINRA stated that it believes that a customer or an authorized representative may not attend, participate in or appear at an expungement hearing for a variety of reasons that may be unrelated to the merits of the expungement request and thus it should not be considered by the panel when deciding a request

⁵⁷⁶ See Notice at 50184.

⁵⁷⁷ See NASAA September 6 Letter at 5.

⁵⁷⁸ See FINRA November 10 Letter at 11 and Amendment No. 1.

⁵⁷⁹ See proposed Rules 12805(c)(8)(C) and 13805(c)(9)(C).

⁵⁸⁰ See Notice at 50184-85.

for expungement.⁵⁸¹ Three commenters supported the amendment.⁵⁸² The Commission received no comment letters opposing the amendment.

The Commission agrees that customers or authorized representatives of a state securities regulator may decide not to appear for a variety of reasons unrelated to the merits of an expungement request and that FINRA reasonably determined that such a decision by a customer or an authorized representative should not be given weight by the panel assessing the request.

10. Forum Fees

The proposed rule change would retain the current requirement that the panel must assess against the parties requesting expungement all forum fees for each hearing in which the sole topic is the determination of the appropriateness of expungement.⁵⁸³

One commenter characterized the existing minimum member surcharge and process fees that would be assessed to firms if an associated person files a straight-in request, following an arbitration that closes other than by award or closes by award without a hearing, as “duplicative” and suggested that these fees be eliminated.⁵⁸⁴ According to this commenter, in a customer arbitration that closes other than by award or by award without a hearing, the member firm would have already paid the member surcharge and processing fee for using the forum.⁵⁸⁵ The member would then have to pay again if named in a subsequent straight-in request.⁵⁸⁶ Another commenter stated similarly that where firms have already paid the fee in the original matter,

⁵⁸¹ See id.; see also FINRA November 10 Letter at 10-11.

⁵⁸² See PIABA Foundation December 7 Letter at 2; PIABA December 7 Letter at 2; NASAA December 7 Letter at 2.

⁵⁸³ See proposed Rules 12805(c)(9) and 13805(c)(10); see also FINRA Rules 12805(d) and 13805(d).

⁵⁸⁴ See SIFMA September 2 Letter at 9.

⁵⁸⁵ See id.

⁵⁸⁶ See id.

associated persons should not then be required to pay another full fee for expungement requests.⁵⁸⁷

In response, FINRA stated that the member surcharge and process fees that a member firm would be assessed if an associated person files a straight-in request are not duplicate fees.⁵⁸⁸ FINRA stated it is appropriate to assess these fees for straight-in requests because such requests initiate separate arbitrations seeking different relief—namely, expungement.⁵⁸⁹ FINRA also stated that if the associated person, or the requesting party in the case of an on-behalf-of request, files a straight-in request after having previously paid the filing fee to request expungement of the same customer dispute information during a customer arbitration that settles or is dismissed, FINRA would not assess a second filing fee when the associated person files the straight-in request.⁵⁹⁰ Moreover, FINRA explained that, in instances in which DRS’s fees may be challenging to pay due to financial hardship, the Director has the authority to defer payment of all or part of an associated person’s filing fee on a showing of financial hardship.⁵⁹¹

FINRA may reasonably assess member surcharge and process fees for straight-in requests. Straight-in requests are separate arbitrations before a separate panel of specially trained arbitrators. Proceedings have costs and it is appropriate that FINRA would require the parties generating those costs to pay them.⁵⁹²

11. Director’s Authority to Deny the Forum

⁵⁸⁷ See FSI at 6.

⁵⁸⁸ See FINRA November 10 Letter at 31.

⁵⁸⁹ See id.

⁵⁹⁰ See id. at 32; see also Notice at 50179 n.95.

⁵⁹¹ See FINRA November 10 Letter at 6.

⁵⁹² Any such fee filings must be filed pursuant to Section 19(b) and Rule 19b-4, and must be consistent with all the relevant statutory and rule requirements.

The proposed rule change would require the Director to decline the use of the DRS arbitration forum if an associated person files an expungement request that the Director determines is ineligible for arbitration under proposed Rules 12805 and 13805.⁵⁹³ The proposed rule change would also provide the Director with authority to decline the use of the DRS arbitration forum if the Director determines that the expungement request was not filed under, or considered in the DRS arbitration forum in accordance with, proposed Rules 12805 or 13805.⁵⁹⁴ FINRA stated that the proposed rule change would help ensure additional safeguards around the expungement process by expanding the circumstances in which the Director is authorized to deny the DRS arbitration forum.⁵⁹⁵

No commenter supported or objected to these proposed changes. The Commission believes that providing the Director with the authority to deny the use of the DRS arbitration forum should enhance the integrity of the expungement process and the CRD system.

⁵⁹³ See proposed Rules 12203(b) and 13203(b). For example, FINRA stated that under the proposed rule change the Director would decline the use of the DRS arbitration forum if: (1) an expungement request is ineligible under the proposed time limitations; (2) a panel has previously considered the merits of, or a court has previously decided, an expungement request associated with the same customer dispute information; (3) an associated person was named as a respondent in a customer arbitration but did not request expungement; (4) an associated person requested expungement but withdrew or did not pursue the expungement request; or (5) a party to a customer arbitration requested expungement on behalf of an unnamed person but the party withdrew or did not pursue an expungement request on behalf of the unnamed person. See Notice at 50182.

⁵⁹⁴ See proposed Rules 12203(c) and 13203(c). For example, FINRA stated that the Director may decline the use of the DRS arbitration forum if the Director determines that: (1) a panel is proposing to issue an award containing expungement of customer dispute information other than pursuant to proposed Rules 12805, 12800(d) and (e) or 13805, as applicable; or (2) an associated person seeks expungement of customer dispute information other than pursuant to proposed Rules 12805, 12800(d) and (e) or 13805, as applicable. See Notice at 50182.

⁵⁹⁵ See Notice at 50182.

E. Notifications to Customers and States Regarding Expungement Requests

1. Associated Persons Notify Customers

The proposed rule change would codify a practice from the Guidance to require the associated person who files a straight-in request to serve all customers whose customer arbitrations, civil litigations, and customer complaints are a subject of the expungement request with a copy of the statement of claim requesting expungement and any answer.⁵⁹⁶ The panel would be authorized to decide whether extraordinary circumstances exist that make service on the customers impracticable.⁵⁹⁷ The proposed rule change would further require the associated person to file with the panel proof of service for the statement of claim and any answers, copies of all documents provided by the associated person to the customers, and copies of all communications sent by the associated person to the customers and any responses received from the customers.⁵⁹⁸ FINRA stated that these proposed rule changes would help ensure that a customer knows about the expungement request and has an opportunity to attend and participate in the expungement hearing.⁵⁹⁹

Three commenters supported this aspect of the proposed rule change.⁶⁰⁰ Two commenters reasoned that the notification requirement would encourage customer participation and reduce unopposed expungement hearings.⁶⁰¹ For the same reasons, one of these commenters

⁵⁹⁶ See proposed Rule 13805(b)(1)(A)(i) and (ii). Proposed Rule 13805(b)(1)(A)(ii) would require the associated person to serve a copy of the statement of claim and a copy of any answer within 10 days of filing.

⁵⁹⁷ See proposed Rule 13805(b)(1)(A)(i).

⁵⁹⁸ See proposed Rule 13805(b)(1)(A)(iv).

⁵⁹⁹ See Notice at 50185.

⁶⁰⁰ See Cornell at 3; NASAA September 6 Letter at 4; St. John's at 3.

⁶⁰¹ See Cornell at 3; St. John's at 3.

further supported the requirement that the associated person file proof of service and copies of all communications with the panel.⁶⁰²

The proposed customer notification provision will help ensure that customers are aware of expungement requests and have an opportunity to participate. Further, requiring filing of proof of service and any communications will help ensure that customers are notified in accordance with the proposed rule change and that customers are not inappropriately dissuaded from participating in an expungement proceeding. Under these proposed rule changes, customers should be more likely to participate in a hearing to decide an expungement request, which helps ensure that the panel has a more fully formed set of evidence upon which to base its decision. With this additional information, the panel should be more likely to award expungement only when appropriate, thereby helping protect the integrity of the information in the CRD system.

2. Director Notifies Customers

To facilitate customer notification of an expungement request, proposed Rule 13805(b)(1)(B)(i) would require an associated person to include in any request to expunge customer dispute information a current address for the relevant customer.⁶⁰³ To help ensure an associated person complies with this proposed obligation, proposed Rule 13307(a)(7) would provide that an expungement request that does not include such address is “deficient,” and the Director may not serve any expungement request that does not include such address, the effect being that such request would not move forward.⁶⁰⁴

⁶⁰² See Cornell at 3.

⁶⁰³ See proposed Rule 13805(b)(1)(B)(i).

⁶⁰⁴ Specifically, under proposed Rule 13307(a)(7), a request for expungement that does not include a current address for the customer would be considered deficient. Pursuant to FINRA Rule 13307(a), the Director will not serve a deficient claim, effectively halting the expungement request until the deficiency is corrected. See also FINRA Rule 13302.

Proposed Rule 13805(b)(1)(B)(i) would require the Director to notify all customers whose customer arbitrations, civil litigations, or customer complaints are the subject of an expungement request of the time, date, and place of any prehearing conferences and the expungement hearing. FINRA stated that this proposed notification requirement would facilitate customer participation in the expungement process by providing the customer the time to plan and prepare for the hearing.⁶⁰⁵ The proposed rule change would also require the Director to: (1) include language in the notice encouraging the customer to attend and participate; and (2) provide the notified customers with access to all documents on the Portal relevant to the expungement request that are filed in: (a) the arbitration requesting expungement relief and (b) a customer-initiated arbitration brought by the customer under the Customer Code that is a subject of the expungement request.⁶⁰⁶

Three commenters recommended amendments to these provisions.⁶⁰⁷ One of these commenters argued that for logistics reasons, customers should only be notified once for the prehearing conference and should not be notified again for the expungement hearing.⁶⁰⁸ Another commenter recommended that the proposed rule change be amended to provide that FINRA “will ‘deliver’ the relevant documents to customers upon request,” rather than providing customers with “access.”⁶⁰⁹ The third commenter recommended that FINRA amend the rule to allow firms to provide the customer’s last known address instead of the current address, stating that an error in the listed current address in the petition for expungement, after the appropriate

⁶⁰⁵ See Notice at 50185.

⁶⁰⁶ See proposed Rule 13805(b)(1)(B)(ii); see also Notice at 50185; see also supra notes 86 and 184 and accompanying text (discussing the Portal).

⁶⁰⁷ See Grebenik; NASAA September 6 Letter at 4; Del Toro.

⁶⁰⁸ See Grebenik.

⁶⁰⁹ See NASAA September 6 Letter at 4.

diligence and attempts to correct the error, should not preclude the filing and granting of the expungement request.⁶¹⁰

With respect to the notification requirements, FINRA stated that customer attendance and participation in expungement hearings helps the panel fully develop a record on which to decide the expungement request.⁶¹¹ FINRA further stated that the associated person seeking expungement should provide the customer's current address, so that the Director will have the most recent contact information to timely notify the customer of the expungement request, prehearing conferences, and expungement hearings.⁶¹² FINRA accordingly declined to amend the proposed rule change in response to these comments.⁶¹³

FINRA likewise declined to amend the proposed rule change in response to one commenter's suggestion that FINRA "will deliver" materials on request, rather than providing access.⁶¹⁴ FINRA responded that these changes were unnecessary because the Portal currently helps ensure that customers receive necessary notifications regarding their arbitration and mediation cases.⁶¹⁵ FINRA stated that it provides case participants with access to documents through the Portal. FINRA explained that once registered on the Portal, a customer may, among other things, view documents and submit documents to FINRA and, for those customers who are unable to access the Portal, DRS would provide paper documents upon request.⁶¹⁶

⁶¹⁰ See Del Toro.

⁶¹¹ See FINRA April 3 Letter at 12.

⁶¹² See id. at 7.

⁶¹³ See id. at 8, 12-13.

⁶¹⁴ See id. at 12-13; see also supra notes 86 and 184 and accompanying text (discussing the Portal).

⁶¹⁵ See FINRA November 10 Letter at 10.

⁶¹⁶ See id.

The proposed rule change related to customer notification would help ensure that customers are notified of expungement requests and able to access related necessary documents. The requirement that an associated person include a current address for the relevant customer would help ensure that customers are notified of expungement requests in a timely manner. Moreover, DRS will provide paper documents to customers that may not have the ability to access the Portal upon request. Notified customers would be more likely to participate in a hearing to decide an expungement request, which would help ensure that the panel has a more fully formed set of evidence upon which to base its decision. With this additional information, the panel is more likely to appropriately decide whether to award expungement, thereby helping protect the integrity of the information in the CRD system.

3. FINRA Notifies State Securities Regulators

The proposed rule change would require FINRA to notify state securities regulators, in the manner to be determined by the Director in collaboration with state securities regulators, of an expungement request within 15 days of receiving an expungement request.⁶¹⁷ FINRA stated that the proposed notification requirement would help ensure that state securities regulators are timely notified of expungement requests.⁶¹⁸

No commenter supported or objected to these proposed changes. Two commenters, however, recommended that FINRA take further action.⁶¹⁹ One commenter suggested that FINRA consider notifying state securities regulators about separate, expungement-only hearings following a simplified arbitration.⁶²⁰ The other commenter suggested that FINRA provide

⁶¹⁷ See proposed Rules 12800(f)(1), 12805(b) and 13805(b)(2)(A). FINRA stated that it would make this notification in connection with expungement requests under the Customer and Industry Codes. See Notice at 50185 n.176.

⁶¹⁸ See Notice at 50185.

⁶¹⁹ See Miami at 7; Hennion at 6.

⁶²⁰ See Miami at 7.

notification to state securities regulators regarding expungement requests “at the time when they have the ability to become involved – at the state court confirmation level.”⁶²¹

In response, FINRA stated that FINRA Rule 2080 requires an associated person seeking to confirm an arbitration award containing expungement relief to name FINRA as an additional party unless this requirement is waived by FINRA.⁶²² In addition, it is FINRA’s practice to notify state regulators when it receives a complaint naming FINRA, or a request for a waiver.⁶²³ Furthermore, FINRA stated that it is not necessary for state securities regulators to participate in separate expungement-only hearings in simplified arbitrations because the panel already would have sufficient information upon which to develop a complete factual record in order to make a fully-informed decision on the expungement request.⁶²⁴ For example, expungement-only hearings in simplified arbitrations would occur after the arbitrator has heard the merits of the customer’s case in an adversarial process.⁶²⁵ Similarly, FINRA stated that it expects an expungement-only hearing to be scheduled shortly after the customer’s dispute is decided or closes, increasing the likelihood of customer attendance and participation.⁶²⁶ Accordingly, FINRA did not amend the proposed rule change in response to these comments.⁶²⁷

The Commission believes that notification to state securities regulators within 15 days of receiving an expungement request should provide adequate notice and, for straight-in requests, allow the state securities regulator to determine whether to participate in the expungement proceeding. As stated above, permitting attendance and participation by state securities

⁶²¹ Hennion at 6.

⁶²² See FINRA November 10 Letter at 8 n.33.

⁶²³ See id.; see also FINRA Rule 2080.

⁶²⁴ See FINRA November 10 Letter at 22.

⁶²⁵ See id.

⁶²⁶ See id.

⁶²⁷ See id. at 22 and 8 n.33.

regulators in straight-in expungement proceedings should enhance the straight-in expungement process. Specifically, inclusion of state securities regulators provides them the opportunity to fulfill their own regulatory obligations, while at the same time increasing the likelihood that the panel in an expungement proceeding that may not involve a customer will hear evidence from multiple viewpoints. With this additional information, the panel is more likely to award expungement only when appropriate, thereby helping protect the integrity of the information in the CRD system. The Commission also believes that panels deciding separate expungement-only hearings in simplified arbitrations should have sufficient information from the underlying claim to develop a complete factual record in order to make a fully-informed decision on the expungement request. In this way, the rule as proposed would help protect the integrity of the information in the CRD system. Finally, FINRA has stated that it will continue to monitor the expungement process to evaluate whether additional rule changes may be necessary to further strengthen the expungement process, including whether to allow state securities regulators to attend and participate in separate expungement-only hearings in simplified arbitrations.⁶²⁸

IV. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-FINRA-2022-024 on the subject line.

Paper Comments:

⁶²⁸ See FINRA April 3 Letter at 18-19.

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2022-024. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2022-024 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendments Nos. 1 and 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendments Nos. 1 and 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register.⁶²⁹ In Amendment No. 2, FINRA modified the proposed rule change to provide that an associated person would be precluded from filing a

⁶²⁹ See 15 U.S.C. 78s(b)(2)(C)(iii).

straight-in request if the customer dispute information involves the same conduct that was the basis of a final regulatory action taken by a securities regulator or SRO. The basis for extending this prohibition is the same as the basis for the original proposed rule change prohibiting an associated person from filing a straight-in request if the customer dispute information is associated with a finding of liability in an arbitration or civil litigation—permitting an expungement claim in these circumstances would constitute a collateral attack on the results of the underlying resolved dispute.

After consideration of the comments FINRA received on the proposed rule change, the Commission believes that Amendment No. 2 represents a reasonable extension of, and is substantially similar to, the original prohibition of an associated person filing a straight-in request where the customer dispute information formed the basis for a past finding of liability and is appropriate and responsive to commenter’s concerns. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁶³⁰ to approve the proposed rule change, as modified by Amendments Nos. 1 and 2, on an accelerated basis.

VI. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change, as modified by Amendments Nos. 1 and 2, is consistent with the provisions of Exchange Act Section 15A(b)(6),⁶³¹ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission also finds that the proposed rule change is consistent with Section 15A(b)(5) of the Exchange Act,⁶³² which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable

⁶³⁰ 15 U.S.C. 78s(b)(2).

⁶³¹ 15 U.S.C. 78o-3(b)(6).

⁶³² 15 U.S.C. 78o-3(b)(5).

dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

IT IS THEREFORE ORDERED pursuant to Section 19(b)(2) of the Exchange Act⁶³³ that the proposed rule change (SR-FINRA-2022-024), as modified by Amendments Nos. 1 and 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶³⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-08147 Filed: 4/18/2023 8:45 am; Publication Date: 4/19/2023]

⁶³³ 15 U.S.C. 78s(b)(2).

⁶³⁴ 17 CFR 200.30-3(a)(12).